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Supreme Court of the United States

October Term, 1994

STATE OF LOUISIANA,

Petitioner

versus

THEODOR A. SCHIRMER,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

1.) Whether Louisiana's electioneering law, LSA-R.S. 18:1462 A, (3) & (4) is constitutional in its ban on political campaigning on election day for matters both on and not on the day's ballot and in its prohibition of the use of campaign paraphernalia such as signs, pictures and other forms of political advertising for both ballot and non-ballot matters to a distance of six hundred (600) feet from the polling place on election day.

2.) Is Louisiana's compelling interest in maintaining a Campaign Free Zone around its polling places during elections best served by its total ban on all political campaigning.

3.) Is the 600-Foot limitation in § 1462 narrowly tailored to protect Louisiana's compelling interest.

4.) Is LSA-R.S. 18:1462 overbroad.

5.) Is. LSA-R.S. 18:1462 A (2) void for vagueness.

LIST OF PARTIES

A.) State of Louisiana by the District Attorney for East Baton Rouge Parish, Honorable Doug Moreau and the Attorney General of Louisiana, Richard Ieyoub.

B.) Theodor A. Schirmer.

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The opinion of the Louisiana Supreme Court is found at 646 So.2d 890 (La. 1994). The denial of Rehearing by the Louisiana Supreme Court is found at 646 So.2d 890 (La. 1995.)

The opinion of the United States Court of Appeal for the Fifth Circuit declaring the same statute constitutional in the companion case is found at 2 F.3d 117 (1993). The Opinion of the United States Supreme Court denying certiorari in the Federal case is found at *Recall '92 v. Edwards*, ___ U.S. ___, 114 S.Ct. 1396, 128 L.Ed. 2d 70 (1994).

JURISDICTION

The Judgment of the Louisiana Supreme Court was entered on November 30, 1994. The petition for Rehearing filed by the petitioner was denied by the Louisiana Supreme Court on March 9, 1995. This Petition for Writ of Certiorari is sought within 90 days of the denial of rehearing and thus is timely pursuant to 28 USCS 1257 and Rules 10.1 (b) and 13 .1 & .4 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT I

"Congress shall make no law . . . abridging the freedom of speech . . ."

AMENDMENT XIV

1. Citizenship rights not to be abridged by states.

   "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

ALL ARTICLES AND AMENDMENTS REGARDING A CITIZEN'S RIGHT TO VOTE.

Article I Sect. 2

"The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

AMENDMENT XIX [1920].

"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have the power to enforce this article by appropriate legislation."

CONSTITUTIONAL PROVISIONS INVOLVED
(continued)

AMENDMENT XXVI [1971].

Section 1.

> "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."

Supreme Court of the United States

October Term, 1994

STATE OF LOUISIANA

Petitioner,

v.

THEODOR A. SCHIRMER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

Petitioner, the State of Louisiana through its Attorney General, respectfully prays that a Writ of Certiorari be granted to review the decision of the Louisiana Supreme Court entered in the above entitled proceeding on November 30, 1994 and the rehearing denied on March 9, 1995 and that the United States Supreme Court docket the case for argument or in the alternative, order a summary reversal of the Louisiana Supreme Court's decision and uphold the constitutionality of Louisiana's electioneering statute, LSA-R.S. 18;1462 (2) (3) & (4) in accord with the decision of the United States Court of Appeals for the Fifth Circuit in the same federal question arising out of the same fact situation, in *Schirmer v. Edwards*, 2 F.3d 117 (5th Cir. 1993) writ denied, sub nom, *Recall '92 Inc. v. Edwards*, ___ U.S. ___, 114 S.Ct. 1396, 128 L.Ed 2d 70 (1994) and in accord with this Honorable Courts' decision in *Burson v. Freeman*, ___ U.S. ___, 112 S.Ct. 1846, 119 L. Ed 2d 5 (1992).

STATEMENT OF THE CASE

This case involves a constitutional challenge to Louisiana's electioneering law, LSA-R.S. 18:1462 A (2) (3) & (4). The Louisiana Supreme Court declared those sections of that statute unconstitutional on federal grounds as violative of the First and Fourteenth amendments to the United States Constitution. This same statute, in this same fact circumstance, but in a civil injunction and declaratory judgment proceeding, was declared constitutional by the United States Court of Appeal for the Fifth Circuit in *Schirmer v. Edwards*, 2 F.3d 117 (5th Cir. 1993) with a writ denial by this Court, sub nom, *Recall '92 v. Edwards*, ___ U.S. ___, 114 S.Ct. 1396, 128 L.Ed. 2d 70 (1994). The federal courts did not rule on the constitutionality of LSA-R.S. 18:1462 A (2). This case is a criminal misdemeanor and this writ application presents a situation squarely within the United States Supreme Court's Rules on "Considerations covering Review on Certiorari" Rule 10.1 (b) as follows:

> "When a state court of last resort has decided a federal question in a way in conflict with the decision of . . . . a federal court of appeal."

This case involves not only the same federal question, i.e. the constitutionality of LSA-R.S. 18:1462 A (3) & (4) on federal first amendment grounds, it is the same fact circumstance. After the Fifth Circuit's decision in *Schirmer v. Edwards*, was upheld by this court's writ denial, the Louisiana Supreme Court on November 30, 1994, rehearing denied March 9, 1995, declared the same statute unconstitutional on federal grounds. The Louisiana Supreme Court claimed reliance on *Burson v. Freeman*, ___ U.S. ___, 112 S.Ct. 1846, 119 L.Ed 2d 5 (1992), but reached a decision which applicants submit is in conflict therewith. Its decision is directly in conflict with the Fifth Circuit's decision on the same statute.

This case arises out of the misdemeanor prosecution of

Theodor A. Schirmer, a lawyer, for attempting to solicit signatures on a recall petition on election day. The facts as found by the Louisiana Supreme Court are set forth in its decision which is included in the appendix. The stipulated facts are as follows:

(1) On October 3, 1992, and at all pertinent times the defendant was conducting his activities within one hundred (100) feet of the polling place at Lee High School, East Baton Rouge Parish, Louisiana;

(2) The activities being conducted by the defendant were concerned solely with the issue of the recall petition of Governor Edwin Edwards which was not on the ballot;

(3) The defendant was not harassing or intimidating any person who was at the polling place to vote;

(4) The defendant was provided written notice to cease his activity or move from the area within six hundred (600) feet of the polling place by the person authorized to provide such notice at the polling location and defendant refused to comply with the written request;

(5) A police officer was summoned and defendant was arrested for failure to cease his activity within six hundred (600) feet of the polling place.

After Schirmer's arrest, the state court prosecution proceeded. On July 19, 1993 a hearing was held on Schirmer's Motion to Quash the bill of information on the grounds that the statute violated his free speech rights under the state and federal constitutions. The trial court declared the statute unconstitutional, concluding that the statute as drawn was unconstitutionally overbroad insofar as it prohibits all political activity within six hundred (600) feet of polling places, and sustained Schirmer's Motion to Quash "on that basis alone and no

other." App ___ 81." The State of Louisiana appealed to the Louisiana Supreme Court which affirmed the trial court.

The procedural history of this case as well as the companion federal case, *Schirmer v. Edwards*, supra, is thoroughly set forth by the Louisiana Supreme Court in its decision and will not be repeated herein. That court held:

> "that LSA-R.S. 18:1462 A (3) & (4), insofar as they prohibit all political authority (including that unrelated to ballot matters) within six hundred (600) feet of a polling place on election day, are unconstitutionally overbroad."

State v. Schirmer, p. 901.

In reaching this decision the Louisiana Supreme Court is in direct conflict with the Federal Fifth Circuit on the same federal question regarding the constitutionality of the same Louisiana statute, arising out of the same fact situation. A writ of certiorari should be granted, *Ward v. Illinois*, 431 U.S. 767, 770, 97 S.Ct. 2085, 2088, (1977) *Baldwin v. Alabama*, 105 S.Ct. 2727, 2729, 472 U.S. 372, 374, (1985), *Memorial Hospital v. Maricopa County*, 94 S.Ct. 1076, 1079. 415 U.S. 250, 253 (1974).

The Louisiana Supreme Court also failed to adhere to this Court's *Burson* decision by substituting what that court views as the appropriate statute in place of the statute enacted by the Louisiana Legislature and approved by the federal courts.

The State Supreme Court also declared § A (2) of the statute void for vagueness.

Petitioner now seeks review of the Louisiana Supreme Court's decision by this Court by Writ of Certiorari.

REASONS FOR GRANTING WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

Introduction

This is a case falling squarely within the Honorable Court's Rules on Considerations Governing Review on Writ of Certiorari, Rule 10 (b) in that the judgment of the Louisiana Supreme Court, for which review is sought is contrary to the judgment of the United States Court of Appeals, Fifth Circuit, concerning the constitutionality of the same Louisiana statute.

THE STATUTE

The Statute declared unconstitutional in part by the Louisiana Supreme Court and upheld by the United States Fifth Circuit is LSA-R.S. 18:1462 (A) (2)(3) & (4) which reads as follows:

LSA-R.S. 18:1462 A

§ 1462. Acts prohibited on election day; electioneering; exception; enforcement; penalty

A. Except as otherwise specifically provided by law, it shall be unlawful for any person, between the hours of 6:00 a.m. and 9:00 p.m., to perform or cause to be performed any of the following acts within any polling place being used in an election on election day or within any place wherein absentee voting is being conducted, or within a radius of six hundred feet of the entrance to any polling place being used in an election on election day or any place wherein absentee voting is being conducted:

(1) To solicit in any manner or by any means whatsoever any other person to vote for or against any candidate or proposition being voted on in such election.

(2) To remain within any such polling place or place wherein absentee voting is being conducted or within a radius of six hundred feet of the entrance of any such polling place, except when exercising the right to vote, after having been directed, in writing, by an election commissioner or law enforcement officer to leave the premises or area of a polling place or after having been directed, in writing, by a registrar or deputy registrar to leave the place wherein absentee voting is being conducted.

(3) To hand out, place, or display campaign cards, pictures, or other campaign literature of any kind or description whatsoever.

(4) To place or display political signs, pictures, or other forms of political advertising.

Amended by Acts 1980, No. 810, § 1; Acts 1982, No. 778, § 1, eff. Aug. 4, 1982.

The Louisiana Supreme Court declared section A (3) & (4) unconstitutional on grounds of overbreadth, and A (2) invalid for vagueness.

ARGUMENT

In the companion federal case, *Schirmer v. Edwards*, 2 F.3d 117 (5th Cir. 1993), in the injunction phase of that case, the Fifth Circuit had certified to the Louisiana Supreme Court the question of whether the electioneering statute, section A (3) & (4), within a radius of 600 feet from the polls, prohibited all solicitations of signatures for a recall petition that is not on the ballot and did it prohibit the wearing of clothing or buttons bearing visible words or symbols supportive of such recall, *Schirmer v. Edwards*, 608 So.2d 948 (La. 1992). In response to that certification, the Louisiana Supreme Court held as follows,

> We find the clear intent of this statute, when taken as a whole, is to prohibit political activity within 600 feet of the polls on election day in order to prevent disruption of the polling place and the election process. Although we agree that subsection (1) does not apply to the present case, we believe subsections (3) and (4) clearly proscribe the conduct at issue. Subsection (3) prohibits the handing out, placement or display of campaign literature "of any kind or description whatsoever." . . . .

Id at 948. The decision on certification is contained in the appendix. The Louisiana Supreme Court found that the intent of the statute was to prohibit all political campaigning or activity within 600 feet from the polls. Armed with this decision, the Fifth Circuit issued a decision, *Schirmer v. Edwards*, No. 92-3900 (5th Cir. Oct. 29, 1992) enjoining Louisiana's officials from enforcing the statute beyond 100 feet from the polling places. Upon consideration of the entire case on appeal, the Fifth Circuit on September 17, 1993 upheld the constitutionality of the statute including the 600 foot zone, thereby reversing the earlier federal panel on the injunction, finding;

> ". . . . that a total ban on politicking within the campaign-free zone is not overbroad. In fact, the total ban in the present context is the most defensible position. The state has a compelling interest in protecting its voters and the proffered reasons given by the legislature demonstrate a reasonable compromise to the problems that necessitated the campaign-free zone in the beginning.

2 F.3d at 123.

The Louisiana Court, when it considered the same statute in the criminal case, almost agreed but declared section 3 & 4 unconstitutional for overbreadth. The Court found that the statute, in prohibiting all political campaigning or "politicking" to use the Fifth Circuit's term, to a distance of 600 feet was

overbroad. The Court in *State v. Schirmer*, 646 So.2d at 900 stated:

> "In light of the *Burson* plurality's approval of the 100 foot boundary employed by Tennessee, were the Louisiana statutory ban on all political speech limited to a 100 foot radius about polling places, we would likely reverse the ruling of the district court declaring the statute unconstitutional."

The Court continued at p. 901;

> "This is not to say that a more narrowly drawn statute, perhaps one which addressed only advertising and voter solicitation relative to matters on the ballot, like the 100 foot Tennessee statute in *Burson*, supra, but one which operates within 600 feet of a polling place, would similarly fail to pass constitutional muster.

It is clear that the 600 foot limitation itself was not a controlling factor and would probably have been approved by the Louisiana Court. The Court then held that it was the combination of these factors, (1) distance at 600 feet and (2) a total ban on political campaigning that crossed the constitutional line, saying at page 902.

> "rather, today we hold only that when both of these aspects of the challenged provisions operate in tandem, extending a total ban on political speech to a distance of 600 feet from polling places, the resulting limitation of free speech at that point overburdens or 'significantly impinges' First Amendment freedoms."

Applicants must note that nothing in the statute bans all political speech, it bans political campaigning. The Court left intact LSA-R.S. 18:1462 A (1), both because it was not challenged and because the Court's reasoning supported it.

Unfortunately the end result was a declaration of invalidity of the State's electioneering statute, in large part.

In the absence of a reversal by the United States Supreme Court, Louisiana will have an electioneering law that doesn't apply to non-ballot matters and doesn't ban advertising or sign usage at the polls at all, even for on ballot matters. Most importantly the decision itself, and the statute suggested by the Louisiana Supreme Court result in an enforcement nightmare, where campaigning is allowed for non-ballot matters at the polls on election day, thereby requiring election workers to determine who is campaigning for what election or proposition. All of this in the face of the United States Fifth Circuit's recognition and holding that a total ban on "politicking" in the campaign free zone is the best solution, See *Schirmer v. Edwards*, Id. at p. 123.

BURSON V. FREEMAN

All of the lower Courts that have decided this case or its companion federal case have acknowledged that this Court's recent decision in *Burson v. Freeman*, ___ U.S. ___, 112 S.Ct. 1846, 119 L.Ed. 2d 5 (1992) controlled the outcome. The federal fifth Circuit in *Schirmer v. Edwards*, the civil case, paid strict adherence to the principles of *Burson* and found that Louisiana had a compelling interest in maintaining a campaign-free zone on election day, that the statute was narrowly tailored to achieve that interest and was not overbroad. The federal court found that the Louisiana statutes' total ban on political activity, as found on certification to the Louisiana Supreme Court at 608 So.2d 948 (La. 1992) was the most defensible position. The Fifth Circuit stated that the total ban could solve Justice Stevens' objections to the Tennessee statute in *Burson*, see *Edwards* p. 123. The logic of this interpretation is clear. The state's compelling interest in preventing voter intimidation and election fraud as found in *Burson*, supra, are best served by a total

ban on political campaigning at the polls. Common sense dictates that if some campaigning is allowed, enforcement would become impossible.

The Louisiana Supreme Court, in this case, agreed, up to a point, holding that a total ban up to 100 feet would be permissible, and a ban on ballot related activities would be permissible up to 600 feet but the total ban to 600 feet is unconstitutional. The end result was an unconstitutional statute. The heart of the Louisiana decision is that at 600 feet, the total ban is an impermissible infringement on freedom of speech grounds under the federal constitution.

The obvious question presented to this Court is whether or not Louisiana's 600 foot campaign free zone, determined to be necessary by the legislature, is impermissibly large. In 1966, this Court in *Mills v. Alabama*, 384 U.S. 214, 86 S.Ct. 1434, 16 L.Ed. 2d 484 (1966) struck down a state law that made it a crime to publish an editorial on election day urging readers to vote a particular way, *Burson*, 112 S.Ct. 1848. Twenty-six years later, the *Burson* Court in upholding the 100 foot Tennessee ban on campaigning stated at 112 S.Ct. 1857,

> "We do not think that the minor geographic limitation prescribed by Section 2-7-111 (b) constitutes such a significant impingement. Thus, we simply do not view the question whether the 100-foot boundary line could be somewhat tighter as a question of "constitutional dimension."

It is applicant's position that the Louisiana Supreme Court erred in finding the State's 600 Foot ban on all political campaigning unconstitutionally large.

The Louisiana court's decision on statutory interpretation on certification to the Fifth Circuit is binding in this case. *R.A.V. v. City of St. Paul, Minnesota*, ___ U.S. ___, 112 S.Ct. 2538,

120 L.Ed. 2d 305. The Fifth Circuit in *Schirmer v. Edwards* properly held that the total ban was more acceptable and enforceable and also found after a thorough review of the legislative history presented in that case, that the 600 foot ban was narrowly tailored to achieve the compelling governmental interest recognized in *Burson* as follows,

> "We find that this wide-spread and time-tested consensus demonstrates that some restricted zone is necessary in order to serve the States' compelling interest in preventing voter intimidation and election fraud. . . . Moreover, because law enforcement officers generally are barred from the vicinity of the polls to avoid any appearance of coercion in the electoral process, see Tenn.Code Ann. § 2-7-103 (1985), many acts of interference would go undetected. These undetected or less than blatant acts may nonetheless drive the voter away before remedial action can be taken."

Burson at 112 S.Ct. 1855.

Louisiana also bars law enforcement officers at the polls on election day, LSA-R.S. 18:428. The *Burson* court found that the real question was how large a zone is required, p. 1856. *Burson* continued at 112 S.Ct. 1857 to discuss what is at the heart of the instant case. A state legislature is not required to prove that the boundary is perfectly tailored to deal with voter intimidation and election fraud. A State's political system is not required to sustain some level of damage before its legislature can take corrective action. In essence, the legislature may respond to the problem and that response is acceptable until it significantly impinges on first amendment rights. At this point it is important to note that the goal of these type statutes is to <u>prohibit</u> voter intimidation and election fraud and to allow the polling places to be campaign free zones. It is the right and obligation of each state to determine how large a zone it deems necessary.

All 50 states limit access to areas in or around polling places, *Burson*, 112 S.Ct. 1855. These zones are not designed to create difficulties for political campaigning at the polls, they are designed to eliminate it. New Hampshire has 10 feet, Louisiana has 600 feet, Kentucky and Wisconsin have 500 feet, thirty-eight states have established campaign free zones of 250 feet or less and Hawaii's is the country's largest at 1000 feet, see *Burson*, 112 S.Ct. 1855 reference to Note, Defoliating the Grassroots; Election Day Restrictions on Political Speech, 77 Geo. L.J. 2137 (1989). None of these states are right or wrong, they have different circumstances. Louisiana and New Hampshire are different places. Louisiana has had a restricted zone around polling places since 1894 beginning with 15 feet. In 1980, by Act 180, the Legislature increased the zone from 300 feet to 600 feet, its present distance. This history is not of record in this case but it was in the Fifth Circuit case, *Schirmer v. Edwards*, supra. The motivating factors for the 1980 amendment increasing the distance from 300 to 600 feet were summarized by the Fifth Circuit at 2 F.3d 121 as follows:

> "Louisiana State Representative Charles Lancaster, who authored the 1980 amendments to Section 1462, testified before the court below. The 1980 amendments expanded the campaign-free zone from 300 feet to 600 feet. Representative Lancaster testified that the statute primarily sought to guard against: (i) voter intimidation; (ii) voter harassment; and (iii) to provide unobstructed access to the polls. Lancaster testified that the problem largely emanated from poll workers, who bombarded voters in and around the polls. Apparently, it was common practice to use poll workers to inundate voters just prior to their entry to the polls. The legislature felt compelled to remedy the situation statutorily. The intent of the statute was to encourage voter participation. Under the statutorily created campaign-free zone, voters are free to vote without passing through a gauntlet of poll workers."

It is the judgment of this state's citizens as expressed by their elected legislators that the 600 foot zone is appropriate. This statute is narrowly drawn in that it applies only when the polls are open on election day and on absentee voting days and its distance is directed to stop campaigning only at the polling places. This statute is necessary in order to provide Louisiana's citizens free and unencumbered access to the polls so that they may exercise their right to vote freely and without interference, intimidation or fraud.

THE CLEAR ISSUE

The issue in this case is clear in light of this Court's holding in *Burson*, hence, the request for an alternative summary disposition. After that decision in 1992, which validated a 100 foot zone, the constitutional parameters were from that point to *Mills v. Alabama*, supra which invalidated the anti-editorial law, thus no distance. The Louisiana Supreme Court in this case has declared 600 feet to be an unconstitutional infringement on free speech, when it encompasses a ban on all campaign activity. There is no question that at some distance, these laws would be invalid. It is the state's position that 600 feet is not that distance. It is narrowly drawn and specifically designed to protect voting not stifle speech.

The issue for decision by the United States Supreme Court is whether the 600 foot zone is impermissably large when applied to all political campaigning whether ballot related or not.

LSA-R.S. 18:1462 (A) (2) IS NOT VOID FOR VAGUENESS

The Louisiana Supreme Court also declared section (A) (2) of the electioneering statute void for vagueness. That section makes it a misdemeanor crime to remain within 600 feet of a polling place after being given written instructions to leave by a poll commissioner or a law enforcement officer. That court held that enforcement of the statute and the conduct prohib-

ited depended upon the discretion of the official on the scene. It is applicant's position that the conduct proscribed is exactly that conduct prohibited in LSA-R.S. 18:1462 which is far from vague. If a person violates the electioneering law then section (2) is applicable. It is the state's position that the statutory scheme envisions the poll commissioner ordering someone to leave only after that person has violated a specific provision of the electioneering law itself. The list of prohibited conduct is contained in the statute itself. There is no dispute that Schirmer was engaged in conduct that should have triggered the application of section (A) (2) see App. 19.

CONCLUSION

This writ application does not require a detailed discussion of the tension between the right to vote freely and the freedom of speech or to campaign. That was done by this Supreme Court in *Burson v. Freeman*, supra. The federal fifth circuit upheld Louisiana's statute on federal constitutional grounds in *Schirmer v. Edwards*, supra and this Court denied writs, sub nom, *Recall '92 v. Edwards*, supra. The Fifth Circuit correctly held that a total ban on "politicking" around the polls was the most defensible position and the most enforceable law. The Louisiana Supreme Court has declared Louisiana's electioneering law unconstitutional because of that total ban on ballot and non ballot matters to 600 feet. Applicants respectfully submit that the Louisiana statute is constitutional under the principles enunciated in *Burson* and followed in *Schirmer v. Edwards*.

The issues in this case are clear and probably do not need reargument in light of the recentness of the *Burson* case, hence the request for summary disposition. The issues at stake here have been elaborately and effectively discussed by the United States Fifth Circuit and by the Louisiana Supreme Court. Their decisions are in conflict. The State submits that the Federal decision should prevail on federal constitutional grounds.

The decision to be made by the United States Supreme Court is whether or not Louisiana's 600 foot campaign free zone as applied to both ballot and non-ballot matters is constitutional. By reversing the Louisiana Court and upholding the 600 foot zone, the distance parameters of the campaign free zones of 49 states will have been validated.

The Louisiana Supreme Court decision is contrary to the controlling United States Supreme Court precedent and contrary to the Federal appellate Court's decision regarding the constitutionality of the same statute in the same fact circum-

stance. This court should grant a writ of certiorari to correct the error of the Louisiana Supreme Court.

Respectfully submitted,

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APPENDIX 1

STATE of Louisiana

v.

Theodor A. SCHIRMER.

***No.* 93-KA-2631.**

Supreme Court of Louisiana.

Nov. 30, 1994.

Rehearing Denied March 9, 1995.

Order Concurring in Denial of Rehearing March 9, 1995.

CALOGERO, Chief Justice.*

The State of Louisiana filed a bill of information charging Theodor A. Schirmer with violating LSA-R.S. 18:1462(A), subsections (2), (3) and (4). In order to provide a sanctuary around polling places so that the electorate might exercise its right to vote without interference and without fear of harassment or intimidation, this statute effectively prohibits all political speech, including that unrelated to matters on the ballot, at a distance of up to 600 feet from polling places on election days.[1] Defendant filed a motion to quash the information, alleging

*Judge Felicia Toney Williams, Court of Appeal, Second Circuit, Associate Justice Pro Tempore, not on panel. Rule IV, Part 2, § 3.

[1] § 1462. Acts prohibited on election day; electioneering; exception; enforcement; penalty

A. Except as otherwise specifically provided by law, it shall be unlawful for any person, between the hours of 6:00 a.m. and 9:00 p.m., to perform or

that the statute under which he was being prosecuted was unconstitutional. The trial court granted the defendant's motion, finding the statute's proscription of all political speech, including that unrelated to matters on the ballot, within 600 feet of the polling place on election days, to be an unconstitutionally overbroad limitation upon the defendant's right of free speech and expression. The State of Louisiana sought review in this Court, invoking our supervisory and appellate jurisdiction. We docketed the case as an appeal under Article V, § 5(D) of the Louisiana Constitution of 1974, since it involves a statute's having been declared unconstitutional.

After considering the statute and the record, we conclude that the trial court was correct in its determination that LSA-R.S. 18:1462(A)(3) and (4) are unconstitutionally overbroad. In addition, we find LSA-R.S. 18:1462(A)(2) unconstitutionally

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cause to be performed any of the following acts within any polling place being used in an election on election day or within any place wherein absentee voting is being conducted, or within a radius of six hundred feet of the entrance to any polling place being used in an election on election day or any place wherein absentee voting is being conducted:

(1) To solicit in any manner or by any means whatsoever any other person to vote for or against any candidate or proposition being voted on in such election.

(2) To remain within any such polling place or place wherein absentee voting is being conducted or within a radius of six hundred feet of the entrance of any such polling place except when exercising the right to vote, after having been directed, in writing, by an election commissioner or law enforcement officer to leave the premises or area of a polling place or after having been directed, in writing, by a registrar or deputy registrar to leave the place wherein absentee voting is being conducted.

(3) To hand out, place, or display campaign cards, pictures, or other campaign literature of any kind or description whatsoever.

(4) To place or display political signs, pictures, or other forms of political advertising.

vague, as it fails to establish adequate guidance to authorities for its enforcement. For the reasons set forth in this opinion, we affirm the judgement of the district court declaring the statute unconstitutional, in violation of the First and Fourteenth Amendments of the United States Constitution.

I. Facts and Procedural Background

Defendant Theodor A. Schirmer is the executive director of a group which styles itself "Recall '92, Inc." The organization's principal objective was to recall the Governor. It was first necessary to obtain the signatures of one-third of the electorate on a recall petition within a 180-day period.[2] *See* LSA- R.S. 18:1300.1 *et seq.*

In October of 1992, the period relevant to this case, Recall '92 was in the middle of its drive (it had until December) to collect the required number of signatures (they were still in need of 750,000 signatures) to force a recall election. Given the voter interest in the November, 1992, presidential election, Recall '92 decided to solicit signatures at polling places during the primary election of October 3, 1992, and the general (presidential) election of November 3, 1992.

This decision by Recall '92 to appear at the polls on October 3 was influenced in part by a belief that the solicitation at polling places of signatures for the recall petition would not constitute a violation of Louisiana law. Theodor A. Schirmer, a lawyer by profession, was aware that the Attorney General had issued two opinions addressing the solicitation near polling places of signatures for petitions unrelated to matters on the ballot. These opinions were that such a solicitation of signatures neither violated the Election Code generally nor LSA-R.S. 18:1462(A) specifically, as long as the activity did not

[2]Defendant Schirmer also served Recall '92 as chairman of the petition drive.

interfere with the voting process. *See* Atty.Gen.Op., Nos. 91-597 (November 12, 1991), and 92-650 (September 24, 1992).

On October 1, 1992, however, two days before the scheduled primary elections at which Recall '92 planned to make its appearance, the Attorney General issued opinion No. 92-650(A). In that opinion the Attorney General, relying upon *Lacour v. State of Louisiana*, No. 90-C-1772 (La.App. 4 Cir.1990), an unpublished opinion out of the Fourth Circuit Court of Appeal, recalled and rescinded his two prior opinions.

Schirmer received a copy of Attorney General Opinion No. 92-650(A) several days prior to the October 3 election. Although Schirmer instructed Recall '92 members to leave polling areas if requested to do so by a poll commissioner, he decided he would personally challenge the constitutionality of LSA-R.S. 18:1462(A). Accordingly, he alerted the officials charged with enforcing the Election Code of his intentions.

On October 3, Schirmer first attempted to vote at his registered precinct, University Terrace in Baton Rouge, but was denied access to the polls because he was wearing a t-shirt bearing a "Recall '92" slogan. Schirmer departed, without incident and without casting a vote, and travelled to the polling place at Lee High School, also in Baton Rouge, where, under the gaze of poll commissioners and other officials, he set up a table and began gathering signatures for the recall petition. After Schirmer refused verbal and written directions to leave, he was placed under arrest.

Following his arrest, Schirmer and related parties filed suit in federal court seeking declaratory and injunctive relief against the enforcement of LSA-R.S. 18:1462(A). On October 19 and 20, 1992, the United States District Court for the Middle District of Louisiana, Polozola, J., presiding, conducted a two-day trial to determine the constitutionality of LSA-R.S. 18:1462(A). At the trial's conclusion, the district court, relying

primarily upon *Burson v. Freeman*, — U.S. ——, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992), found that the statute was constitutional. Accordingly, he dismissed the plaintiffs' lawsuit and denied injunctive relief for the November 3 election.

Plaintiffs appealed the federal district court's decision to the United States Fifth Circuit Court of Appeals, seeking in the interim temporary injunctive relief pending appeal. In response to the latter, a panel of the Fifth Circuit certified the following question to this Court pursuant to La.S.Ct. Rule XII:

> Whether La.R.S. 18:1462A proscribes on election day, outside of the polling place itself but within a radius of six hundred feet from the entrance thereto, all solicitation of signatures for a recall petition that is not on the ballot that is to be voted on at the election for which the polling place is open, and in the polling place or said six hundred foot radius all wearing of clothing or buttons bearing visible words or symbols supportive of such recall?

Schirmer v. Edwards, 608 So.2d 948, 948 (La.1992).

On October 29, 1992, this Court responded to the certified question. We began by noting that "the clear intent of this statute, when taken as a whole, is to prohibit political activity within 600 feet of the polls on election day in order to prevent disruption of the polling place and the election process." *Schirmer, supra*, 608 So.2d at 949 (La.1992). Applying the statute to the particular facts of this case, the Court found that although LSA-R.S. 18:1462(A)(1) did not apply to Schirmer's actions, "subsections (3) and (4) clearly prohibit the conduct at issue."[3] *Id.* Specifically, we stated the following:

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[3]The Court directly answered the certified question in the following way:

> La.R.S. 18:1462(A)(3) proscribes on election day, outside of the polling place itself but within a radius of six hundred feet from the

> "We find the solicitation of signatures for a recall petition not on the ballot of that election, but which its backers ultimately hope to get on the ballot, fits this broad definition of handing out or displaying campaign literature. Likewise, we hold the wearing of clothing or buttons supporting such a recall effort is a display of political advertising prohibited by subsection (4)."

Id., citing Atty.Gen.Op., No. 92-650(A), and *Lacour v. State of Louisiana*, supra. We were careful to note, however, that "our opinion deals only with the question certified [one regarding statutory interpretation], and we do not pass on any issues of constitutionality under either the United States Constitution or the Louisiana Constitution." *Id.*, at 948 n1.

Upon receipt of our answer to the certified question the Fifth Circuit, and armed with this Court's construction of LSA-R.S. 18:1462(A), granted Schirmer's and the other plaintiffs' motion for injunctive relief pending disposition of their appeal.[4] Specifically, the federal appellate court enjoined state of-

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> entrance thereto, all solicitation of signatures for a recall petition that is not on the ballot that is to be voted on at the election for which the polling place is open. La.R.S. 18:1462(A)(4) proscribes in the polling place or said six hundred foot radius all wearing of clothing or buttons bearing visible words or symbols supportive of such recall.

Schirmer, supra, at 949.

The Louisiana Legislature has since clarified this issue by enacting LSA-R.S. 18:1300.6(A), which makes it a misdemeanor offense for "any person to circulate recall petitions or seek signatures to a recall petition within any polling place . . . or within a radius of (600) feet of the entrance to any polling place . . . on election day." See La.Acts 1993, No. 219, § 1. While the constitutionality of LSA-R.S. 18:1300.6(A) is not currently at issue, we do consider our decision in this case instructive on this point.

[4]This action of the Fifth Circuit was of course predicated upon the probability of the federal plaintiffs' success in their suit. That determination was

ficials from enforcing LSA-R.S. 18:1462(A) so as to preclude Schirmer and others from soliciting, on public streets, sidewalks or other outdoor public areas, signatures for the recall petition at polling sites during the November 3 presidential election. *Schirmer v. Edwards*, No. 92-3900 (5th Cir. Oct. 29, 1992). The injunction did, however, allow enforcement of the statute within 100 feet of the entrances to polling places.

In state court, meanwhile, the criminal prosecution of Schirmer for violating LSA-R.S. 18:1462(A) proceeded, and on July 19, 1993, a hearing was held in conjunction with Schirmer's motion to quash the bill of information.[5] In conjunction with this hearing the State and Schirmer entered into a joint stipulation of fact which set forth the following:

> (1) On October 3, 1992, and at all pertinent times the defendant was conducting his activities within one hundred (100) feet of the polling place at Lee High School, East Baton Rouge Parish, Louisiana;
>
> (2) The activities being conducted by the defendant were concerned solely with the issue of the recall petition of Governor Edwin Edwards which was not on the ballot;

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in large measure based upon the testimony presented on October 19 and 20 before the federal district court in Baton Rouge. Since the evidence adduced during those two days is not part of the record before us, it can have no impact upon our consideration or decision in this case. However, as the decision of the Fifth Circuit granting injunctive relief was properly introduced into evidence in the proceeding below, we have considered its contents, including the reasons given by the Fifth Circuit for its ruling, in arriving at our decision.

[5]This motion challenged the statute's constitutionality on the grounds of violation of the free speech provisions of the federal and state constitutions, including overbreadth, the selective enforcement of the statute against Schirmer, and "other reasons which will be shown at the hearing of this motion." In addition, Schirmer has raised before this Court the question of whether the statute is unconstitutionally vague.

(3) The defendant was not harassing or intimidating any person who was at the polling place to vote;

(4) The defendant was provided written notice to cease his activity or move from the area within six hundred (600) feet of the polling place by the person authorized to provide such notice at the polling location and defendant refused to comply with the written request;

(5) A police officer was summoned and defendant was arrested for failure to cease his activity within six hundred (600) feet of the polling place.

After considering this joint stipulation and the testimony of several witnesses,[6] the trial court declared the statute unconstitutional and quashed the information. The judge noted that Louisiana's 600-foot boundary was the second largest in the United States, and that "the majority of states enforce a 100-foot boundary."[7] In addition, the trial court considered the

[6]All four witnesses were called by the defense. They included Jerry Fowler, Commissioner of Elections and Voter Registration for the State of Louisiana; Doug Welborn, Clerk of Court for the Nineteenth Judicial District (East Baton Rouge Parish), State of Louisiana; Rosemary Cannon, Supervisor of the Election Department for Welborn; and the defendant, Theodor A. Schirmer.

[7]The facts relied upon by the trial court were in large measure culled from the opinion of the Fifth Circuit rendered in conjunction with the granting of Schirmer and the other federal plaintiffs' motion for an interim injunction. *See Schirmer v. Edwards, supra*, at 8. The Fifth Circuit's well-researched opinion also established the following:

> We note that the distance prescribed by section 1462A is 600 feet, 6 times that sustained in *Burson;* the area involved is more than 1,130,000 square feet, approximately 36 times as large as that involved in *Burson* (31,400 square feet). This is greater than any state except Hawaii, which uses a 1,000 foot radius. Only two other states, Kentucky and Wisconsin, each five hundred feet, exceed three hundred feet. Some 37 or 38 states use 250 feet or less, some

[1]We note that our opinion deals only with the question certified, and we do not pas on any issues of constitutionality under either the United States Constitution or the Louisiana Constitution.

United States Supreme Court's pronouncement in *Burson v. Freeman*, supra, and concluded that "[i]n the *Burson* case the Supreme Court didn't give you a whole lot to go on other than to say there is nothing wrong with a hundred feet." The judge concluded that the statute as drawn was unconstitutionally overbroad insofar as it prohibits all political activity within 600 feet of polling places, and sustained Schirmer's motion to quash "on that basis alone and no other." The State of Louisiana took exception to this ruling, and moved for and received permission to seek review in this Court. *See* La. Const. Art. V, § 5(D).

Two months later, the United States Fifth Circuit[8] handed down a final decision in Schirmer's federal appeal. *Schirmer v. Edwards*, 2 F.3d 117 (5th Cir.1993). Like the federal and state district courts before them, the Fifth Circuit found *Burson v. Freeman, supra*, the controlling precedent. Following the analysis of the *Burson plurality*,[9] the Fifth Circuit found that the Louisiana statute implicated three First Amendment Concerns ("regulation of political speech, regulation of speech in a pub-

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25 of these using 100 feet or less.

Schirmer, supra, at 8, *citing* Note, *Defoliating the Grassroots: Election Day Restrictions in Political Speech*, 77 Geo.L.J. 2137, 2146- 47, 2196-2200 (1989).

[8]The panel of the Fifth Circuit which handed down the ultimate decision in Schirmer's federal appeal was not composed of the same judges as the panel that had earlier granted Schirmer's motion for an injunction pending appeal.

[9]*Burson* will be discussed in greater detail infra. The opinion of the Court in *Burson* was a plurality opinion authored by Justice Blackmun and joined by Chief Justice Rehnquist and Justices White and Kennedy. Justice Kennedy also filed a separate concurring opinion. Justice Scalia concurred in the judgement, but differed with the plurality on the reasoning behind the judgement. Justice Stevens, joined by Justices O'Connor and Souter, dissented. Justice Thomas took no part in the consideration or decision of the case.

lic forum, and regulation of speech based on content"), and that therefore "[s]trict scrutiny requires Louisiana to show that Section 1462 is narrowly tailored to achieve a compelling governmental interest." *Schirmer, supra*, 2 F.3d at 120 (*citation omitted*).

After examining the record before it, the Fifth Circuit concluded "that Louisiana undoubtedly has a compelling interest to protect its citizens' right to vote." *Schirmer, supra*, 2 F.3d at 121. However, at this point in its analysis the Fifth Circuit departed from the prior finding of the state district court under review here, as well as from the reasoning of the prior Fifth Circuit panel which had granted Schirmer and the other federal plaintiffs an injunction for the November 3 election. The federal appellate court found the statute to be "narrowly drawn and not an excessive infringement on the First Amendment." *Id.*, at 124. In addressing the statute's embrace of all political speech, not only speech related to matters on the ballot, the Fifth Circuit found that "[t]he need for a total ban is compelling and Section 1462 is not overbroad." *Id.* Based upon these findings, the Fifth Circuit found that Louisiana's statute represents a "constitutional compromise" and affirmed the district court's dismissal of Schirmer's and the other federal plaintiffs' suit. *Id.*[10]

Thus, to summarize, the case now before us arose out of the arrest of Theodor A. Schirmer on October 3, 1992. That arrest led to the filing of a federal civil suit by Schirmer and related parties, and to a criminal prosecution of Schirmer by the State of Louisiana. The federal suit proceeded to trial first, with the district court finding the statute under which Schirmer was

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[10]The plaintiffs' petition for certiorari to the United States Supreme Court was subsequently denied, *sub nom. Recall '92, Inc. v. Edwards*, — U.S. ——, 114 S.Ct. 1396, 128 L.Ed.2d 70 (1994), and the decision of the Fifth Circuit is now final.

arrested constitutional and dismissing the lawsuit. A panel of the federal appellate court, however, expressing doubts as to the statute's constitutionality under the First Amendment, issued an injunction favorable to the federal plaintiffs regarding the November 3, 1992, elections. Following this action, the state district court, following the reasoning of the federal appellate panel which issued the injunction, granted a motion to quash on the grounds that the statute was an unconstitutionally overbroad impingement of Schirmer's right to free speech and expression. A different panel of the federal appellate court, however, subsequently departed from the reasoning of the earlier panel and found the statute constitutional, affirming the United States district court's dismissal of the federal civil lawsuit. We now consider, in review of the decision of the state district court quashing the information in the criminal prosecution, the constitutionality of LSA-R.S. 18:1462(A)(2)-(4).

II. Discussion

As the lengthy procedural history of this case suggests, the issues which we consider in this opinion have already been examined in a number of fora, leaving this Court with some not entirely consistent opinions regarding these matters. At the outset we deem it advisable to set forth the basic principles of First Amendment[11] jurisprudence which will guide our review of this case.

A. Fundamental Precepts of First Amendment Review

The United States Supreme Court has adopted (as in many areas of constitutional jurisprudence) a means-ends analysis or "balancing" approach in assessing the validity of state action which burdens a citizen's exercise of free speech. *See Konigsberg v. State Bar of California*, 366 U.S. 36, 49-51, 81 S.Ct. 997, 1005-07, 6 L.Ed.2d 105 (1961), *re'hg denied*, 368 U.S. 869, 82 S.Ct. 21, 7 L.Ed.2d 69 (1961), *and other cases cited herein*. Under this approach, the State's purpose and the means used to achieve that purpose must be sufficiently related to justify any limitation upon free speech, although the extent to which a reviewing court will probe that means-ends relationship is dependent upon the context in which the State action operates and the burden which it imposes. *See Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 573, 107 S.Ct. 2568, 2571, 96 L.Ed.2d 500 (1987); *Cornelius v. NAACP Legal De-*

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[11]The State of Louisiana suggests that "a review of Louisiana cases considering free speech indicates that the state constitutional provision grants no additional rights beyond those granted to Louisiana's citizens by the federal constitution." *Original Brief of State of Louisiana*, P. 7, *citing State v. Burgess*, 543 So.2d 1332 (La.1989); *State v. Newton*, 328 So.2d 110 (La.1975); *City of Baton Rouge v. Ewing*, 308 So.2d 776 (La.1975); *City of New Orleans v. Lewis*, 263 La. 809, 269 So.2d 450 (1972), rev'd, 415 U.S. 130, 94 S.Ct. 970, 39 L.Ed.2d 214 (1974). Because we dispose of this case upon federal constitutional grounds, we find it unnecessary to address the extent of the Louisiana Constitution's protection of speech and expression.

fense and Ed. Fund, Inc., 473 U.S. 788, 800, 105 S.Ct. 3439, 3448, 87 L.Ed.2d 567 (1985). For example, regulation of speech which does not focus upon the particular content of the speech sought to be regulated, but rather which seeks only to limit the time, place, or manner of speech in a non-public forum is subject to a less exacting standard of scrutiny, and the fit between the ends sought and the means used to achieve such regulation must merely be "reasonable" for it to survive judicial scrutiny. *See United States v. Kokinda*, 497 U.S. 720, 110 S.Ct. 3115, 111 L.Ed.2d 571 (1990) (plurality opinion) (postal walkway is a non-public forum, and therefore reasonable, content-neutral regulation is constitutionally permissible). *See also Thornburg v. Abbott*, 490 U.S. 401, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989); *Frisby v. Schultz*, 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988); *Kovacs v. Cooper*, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949).

However, LSA-R.S. 18:1462(A)(3) and (4),[12] which forbid the distribution of campaign literature and political advertising, are not content- neutral restrictions. Rather, these subsections of the statute, as construed by this Court, operate to prohibit all "political speech," albeit only within prescribed boundaries. *Schirmer, supra*, 608 So.2d at 649. Such content-based[13] regulation of speech is subject to strict scrutiny, partic-

[12]For the text of these subsections, *see* Note 1, supra. LSA-R.S. 18:1462(A)(2) will be considered later in this opinion.

[13]The United States Supreme Court "has held that the First Amendment's hostility to content-based regulation extends not only to a restriction on a particular viewpoint, but also to a prohibition of public discussion of an entire topic." *Burson v. Freeman, supra*, — U.S. at ——, 112 S.Ct. at 1850, citing *Consolidated Edison Co. v. Public Service Comm'n of New York*, 447 U.S. 530, 537, 100 S.Ct. 2326, 2333, 65 L.Ed.2d 319 (1980); *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 502 U.S. 105, 115- 16, 112 S.Ct. 501, 508, 116 L.Ed.2d 476 (1991). "As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed

ularly when that regulation takes aim at "political speech," a category of speech to which "the First Amendment 'has its fullest and most urgent application.'" *Eu v. San Francisco Democratic Comm.*, 489 U.S. 214, 223, 109 S.Ct. 1013, 1020, 103 L.Ed.2d 271 (1989), quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272, 91 S.Ct. 621, 625, 28 L.Ed.2d 35 (1971). *See also Boos v. Barry*, 485 U.S. 312, 321, 108 S.Ct. 1157, 1164, 99 L.Ed.2d 333 (1988) ("a *content based* restriction on *political speech in a public forum* . . . must be subjected to the most exacting scrutiny"); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 784-785, 98 S.Ct. 1407, 1420, 55 L.Ed.2d 707 (1978) (*citation omitted*) ("[i]n the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue"). Indeed, "there is practically universal agreement that a major purpose of (the First) Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218, 86 S.Ct. 1434, 1437, 16 L.Ed.2d 484 (1966). Accordingly, for a challenged statute to survive strict scrutiny it must be shown that the statute is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45, 103 S.Ct. 948, 955, 74 L.Ed.2d 794 (1983). *See also Simon & Schuster, Inc., supra*, at 117-18, 112 S.Ct. at 509.

This case offers a slight variation upon the "strict scrutiny" formula, however, because the affected interests include not only the State's interest in regulating elections and the citizen's interest in free speech and expression, but also the citizen's right to vote without being harassed or intimidated. Thus, this case requires that the defendant's right to free speech be reconciled with separate concerns which also possess a constitu-

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are content-based." *Turner Broadcasting System, Inc. v. Federal Communications Commission*, — U.S. ——, ——, 114 S.Ct. 2445, 2459, 129 L.Ed.2d 497 (1993).

tional dimension.[14] *Compare Sheppard v. Maxwell*, 384 U.S. 333, 361-363, 86 S.Ct. 1507, 1521-1522, 16 L.Ed.2d 600 (1966) (Court balancing free speech rights of trial participant's against an accused's right to a fair trial). Fortunately, the United States Supreme Court has addressed this "clash of freedoms" in the case upon which all of the courts which previously entertained this dispute relied in reaching their respective decisions, namely *Burson v. Freeman*.[15]

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[14] No right is more precious in a free country than that of having a choice in the election of those who make the laws under which, as good citizens, they must live. Other rights, even the most basic, are illusory if the right to vote is undermined.

Wesberry v. Sanders, 376 U.S. 1, 17, 84 S.Ct. 526, 535, 11 L.Ed.2d 481 (1964).

[15] While this Court is aware that *Burson* was a plurality opinion in which only the Chief Justice and three associate justices of the Supreme Court joined, we join those courts before us in concluding that *Burson* must dictate, directly or indirectly, the result in this case. *See, however, R.A.V. v. St. Paul*, — U.S. —, 112 S.Ct. 2538, 2554-2555, 120 L.Ed.2d 305 (1992) (White, Blackmun, O'Connor, and Stevens, Jj., concurring) (questioning continued vitality of *Burson*). In doing so, we recognize that *Burson* represents somewhat of a departure from the trend in the jurisprudence of a number of lower courts. *See Clean-Up '84 v. Heinrich*, 759 F.2d 1511 (11th Cir.1985); *Committee for Sandy Springs v. Cleland*, 708 F.Supp. 1289 (N.D.Ga.1988); *Florida Committee for Liability Reform v. McMillan*, 682 F.Supp. 1536 (M.D.Fla.1988); *Firestone v. News-Press Publishing Co.*, 538 So.2d 457 (Fla.1989); *Dorn v. Board of Trustees*, 203 Mont. 136, 661 P.2d 426 (1983). However, we also discern a separate trend in the jurisprudence of the Supreme Court, culminating in *Burson*, which shows deference to State regulation aimed at preserving the integrity of the electoral process. *See Munro v. Socialist Workers Party*, 479 U.S. 189, 107 S.Ct. 533, 93 L.Ed.2d 499 (1986); *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (per curiam); *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973); *Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968); *United Public Workers v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947). In addition, we observe that while *Burson* was only a plurality decision, the concurring opinion of Justice Scalia rested upon grounds even more deferential to State regulation. For these reasons, we adopt the analysis set out in *Burson* in our consideration of this case.

B. *Burson v. Freeman*: The First Amendment and the Electoral Process

In *Burson*, the United States Supreme Court considered the constitutionality of a Tennessee statute which prohibited the solicitation of votes and the display or distribution of campaign materials within 100 feet of a polling place. As noted by the United States Fifth Circuit in its consideration of this case,[16] the *Burson* Court's plurality found that the statute in question implicated several core First Amendment concerns, and accordingly subjected the statute to strict scrutiny. The result of this scrutiny was the conclusion that the Tennessee statute was enacted to foster a compelling state interest, namely "protecting voters from confusion and undue influence." *Burson, supra*, —— U.S. at ——, 112 S.Ct. at 1851. In addition, the plurality observed that "[w]hile we readily acknowledge that a law rarely survives (strict) scrutiny, an examination of the evolution of election reform, both in this country and abroad, demonstrates the necessity of restricted areas in or around polling places." *Burson, supra*, at ——, 112 S.Ct. at 1852.

Finding that "[a] long history, a substantial consensus, and simple common sense show that some restricted zone around polling places is necessary to protect that fundamental right," the plurality went on to evaluate whether the means utilized by Tennessee's legislature were narrowly drawn to achieve its desired end. *Burson, supra*, at ——, 112 S.Ct. at 1858. Under the conventional formulation of this aspect of strict scrutiny, the legislative "purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved," and therefore "[t]he breadth of legislative abridgement (of First Amendment rights) must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton v. Tucker*, 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5

[16] *See* text at note 9, *supra*.

L.Ed.2d 231 (1960) (*footnotes omitted*). *See also Ward v. Rock Against Racism*, 491 U.S. 781, 799, 109 S.Ct. 2746, 2758, 105 L.Ed.2d 661 (1989) ("Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals").

The *Burson* plurality at this point, however, departed from the traditional strict scrutiny analysis. It chose, instead, what it termed a "modified 'burden of proof' " approach, focusing not upon alternative means of achieving the compelling legislative purpose, but rather whether the means chosen by the State "significantly impinged" upon constitutionally protected rights. *Burson, supra*, —— U.S. at ——, 112 S.Ct. at 1857. The plurality made clear that this departure from precedent was "because a government has such a compelling interest in securing the right to vote freely" that "'Legislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively.' " *Id.*, at ——, 112 S.Ct. at 1856, 1857, *quoting Munro v. Socialist Workers Party*, 479 U.S. 189, 195-196, 107 S.Ct. 533, 537-538, 93 L.Ed.2d 499 (1986). The plurality was also careful to specify the limited context in which this "modified 'burden of proof'" was to operate: "it applies only when the First Amendment right threatens to interfere with the act of voting itself, *i.e.*, cases involving voter confusion from overcrowded ballots, . . . or cases such as this one, in which the challenged activity physically interferes with electors attempting to cast their ballots." *Id.*, —— U.S. at ——, 112 S.Ct. at 1856 n. 11.

Considering the statutory 100 foot proscription upon campaign advertising and voter solicitation before it, the *Burson* plurality declared, with little discussion, that "[w]e do not think that the minor geographic limitation prescribed by (the Tennessee legislature) constitutes such a significant impingement." *Burson, supra*, at ——, 112 S.Ct. at 1857. The plurality

did go on to note that "[a]t some measurable distance[17] from the polls, of course, governmental regulation of vote solicitation could effectively become an impermissible burden." *Id.* Confining its decision to the facts before it, the plurality concluded only that "it is sufficient to say that in establishing a 100-foot boundary, Tennessee is on the constitutional side of the line." *Id.*

C. Application of the *Burson* Plurality's Approach to LSA-R.S. 18:1462(A)(3) and (4)

There is no doubt that the activities engaged in by Schirmer constituted "political speech," triggering the strict scrutiny analysis described supra. *See Meyer v. Grant*, 486 U.S. 414, 421-422, 108 S.Ct. 1886, 1892, 100 L.Ed.2d 425 (1988) ("the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech' "). Thus, following the *Burson* analysis, we must first ask whether the LSA-R.S. 18:1462(A)(3) and (4) are necessary to achieve a compelling state interest. If so, we must consider whether the statute as

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[17]The Court also noted, perhaps contradictorily, that

> we simply do not view the question whether the 100-foot boundary line could be somewhat tighter as a question of 'constitutional dimension.' Reducing the boundary to 25 feet, as suggested by the Tennessee Supreme Court, is a difference only in degree, not a less restrictive alternative in kind.

Burson, supra, at —, 112 S.Ct. at 1857. The United States Fifth Circuit relied upon this passage in reaching its decision, finding that it "suggests that the plurality would have supported a 600-foot limitation" such as that before this Court. *Schirmer, supra*, 2 F.3d at 122. We reject this reasoning insofar as it intimates that the size of the protective zone is irrelevant to a determination of the extent to which First Amendment rights have been "significantly impinged." As the *Burson* plurality itself observed, "[t]he real question is *how large* a restricted zone is permissible or sufficiently tailored." *Burson, supra*, — U.S. at —, 112 S.Ct. at 1856.

drawn "significantly impinges" upon the defendant's First Amendment rights.

Like the *Burson* plurality, we believe that "some restricted zone is necessary in order to serve the States' compelling interest in preventing voter intimidation and election fraud." *Burson, supra,* at —, 112 S.Ct. at 1855. This concern is at least as compelling in Louisiana, given what the Secretary of State, in his *amicus curiae* brief to this Court, terms our "unique and colorful political history, . . . a history rife with election tampering, intimidation, and fraud." The record before us contains testimony by a number of state officials attesting to the fact that the challenged statute's purpose is to create a protected zone wherein voters may exercise their right to vote free from unwanted interference or influence. Thus, like the United States Fifth Circuit, "[w]e conclude that Louisiana undoubtedly has a compelling interest in protecting its citizens' right to vote," and that a prohibitory statute somewhat like LSA-R.S. 18:1462(A) designed to protect the sanctity of the ballot box is necessary to further that interest. *Schirmer, supra,* 2 F.3d at 121.

Given this determination, we move to the question of whether the statute "significantly impinges" upon First Amendment freedoms. Were our review limited solely to the activities of Schirmer and the statute's effect "as applied," this Court, in light of *Burson,* would have no difficulty in finding defendant Schirmer's activities legitimately proscribed. The record contains a joint stipulation of fact, noted *supra,* which includes an agreement between the parties that Schirmer was at all relevant times conducting his activities within 100 feet of a polling place. Although not directly related to matters on the ballot, Schirmer's conduct, given his close proximity to the polling place, certainly offered the possibility of disrupting the voting process and intimidating prospective voters.

The *Burson* plurality observed that within Tennessee's "mi-

nor geographic limitation" of 100 feet a comprehensive ban on any activity which threatened the integrity of the election process was permissible. The plurality's reasoning was that although a more narrowly drawn statute, one directly addressing attempts to interfere with the electoral process, might be an available alternative, "[i]ntimidation and interference laws fall short of serving a State's compelling interests because they 'deal with only the most blatant and specific attempts' to impede elections."[18] *Burson, supra,* —— U.S. at ——, 112 S.Ct. at 1855, *citing Buckley v. Valeo,* 424 U.S. 1, 28, 96 S.Ct. 612, 639, 46 L.Ed.2d 659 (1976) (*per curiam*) (existence of bribery statute does not preclude need for limits on campaign contributions). Indeed, "undetected or less than blatant acts may nonetheless drive the voter away before remedial action can be taken." *Id.* In light of the *Burson* plurality's approval of the 100 foot boundary employed by Tennessee, were the Louisiana statutory ban on all political speech limited to a 100 foot radius about polling places, we would likely reverse the ruling of the district court declaring the statute unconstitutional.[19]

However, Schirmer's motion to quash was granted by the court below not because LSA-R.S. 18:1462(A) impermissibly prohibited Schirmer's conduct, but rather because in doing so it exhibited an overbroad reach. The doctrine of overbreadth,[20]

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[18]The *Burson* plurality, in adopting this approach, appears to have departed from the general policy that "[b]road prophylactic rules in the area of free expression are suspect." *NAACP v. Button,* 371 U.S. 415, 438, 83 S.Ct. 328, 340, 9 L.Ed.2d 405 (1963).

[19]We note in passing that at least one other jurisdiction has read *Burson* to approve "a prohibition on all speech within certain geographic boundaries." *State v. Petersilie,* 334 N.C. 169, 432 S.E.2d 832, 842 (1993).

[20]Schirmer has raised arguments in this Court concerning whether the statute under which he is charged is unconstitutionally "vague," a specie of due process violation. We express some doubt regarding this proposition as it relates to LSA-R.S. 18:1462(A)(3) and (4), especially in light of our previ-

so-called, is a creature unique to the First Amendment, in particular Free Speech. It applies to statutes which, although used to punish activities which may be legitimately regulated, nevertheless include within their prospective reach speech or conduct protected by the First Amendment. *See City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984); *Hill v. City of Houston*, 764 F.2d 1156, 1161 (5th Cir.1985), *cert. denied*, 483 U.S. 1001, 107 S.Ct. 3222, 97 L.Ed.2d 729 (1987). *See also* Note, *The First Amendment Overbreadth Doctrine*, 83 Harv.L.Rev. 844 (1970). As overbreadth was explained in *NAACP v. Button*, 371 U.S. 415, 432, 83 S.Ct. 328, 338-339, 9 L.Ed.2d 405 (1963),

> the (challenged statute) may be invalid if it prohibits privileged exercises of First Amendment rights whether or not the record discloses that the petitioner has engaged in privileged conduct. For in appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar.[21]

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ous construction of the challenged statute in response to the Fifth Circuit's certified question. *See Schirmer, supra*, 608 So.2d at 949 ("[w]e find that the clear intent of this statute . . . is to prohibit political activity within 600 feet of the polls on election day"). However, we also note that vagueness and overbreadth are related concepts, and that the Supreme Court often speaks of them in the same breath. *See Dombrowski v. Pfister*, 380 U.S. 479, 486, 85 S.Ct. 1116, 1120-1121, 14 L.Ed.2d 22 (1965). *Accord*, Note, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U.Pa.L.Rev. 67, 110-113 (1960). Because we find LSA-R.S. 18:1462(A)(3) and (4) to be an unconstitutionally overbroad limitation upon Free Speech, we need not address the vagueness issue as to those subsections of the statute.

[21]However, since overbreadth is such "strong medicine," a court should strike a statute as overbroad "only when the flaw is a substantial concern in the context of the statute as a whole." *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 615, 93 S.Ct. 2908, 2916, 2917-2918, 37 L.Ed.2d 830 (1973). *See also Village*

LSA-R.S. 18:1462(A)(3) and (4), as construed by this Court in response to the certified question from the United States Fifth Circuit, operates "to prohibit political activity within 600 feet of the polls on election day." *Schirmer, supra,* 608 So.2d at 949. Although we do not regard as unduly onerous such a prohibition (on all political activity) within the narrow confines approved in *Burson* (100 feet), when that blanket proscription on political speech is extended to 600 feet we find that "a difference only of degree" becomes a difference of kind, a difference of "constitutional dimension." *Burson, supra,* —— U.S. at ——, 112 S.Ct. at 1857. This is particularly true when the 600-foot limitation is considered in a crowded urban context, where, because of greater population density, polling places tend to be more closely situated. In such circumstances the 600 foot radius may often include a large number of surrounding streets, alleyways, and neutral grounds, with the application of the statute as written stifling political speech in traditional public fora. *See Hague v. CIO,* 307 U.S. 496, 515, 59 S.Ct. 954, 964, 83 L.Ed. 1423 (1939) ("[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public"). We find such a burden upon the exercise of First Amendment rights to be a "significant impingement" on those rights, and thus conclude that LSA-R.S. 18:1462(A)(3) and (4), insofar as they prohibit all political activity (including that unrelated to ballot matters) within 600 feet of a polling place on election day, are unconstitutionally overbroad.

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of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 636-638, 100 S.Ct. 826, 835-837, 63 L.Ed.2d 73 (1980), *re'hg denied,* 445 U.S. 972, 100 S.Ct. 1668, 64 L.Ed.2d 250 (1980). We have no problem in applying an overbreadth analysis in this case, since the constitutional "flaw" which we perceive, i.e. the amount of protected speech drawn into the net of LSA-R.S. 18:1462(A), is central to the statute's purpose, namely to prohibit political expression around polling places in order to protect the integrity of the electoral process.

This is not to say that a more narrowly drawn statute, perhaps one which addresses only advertising and voter solicitation relative to matters on the ballot, like the 100 foot Tennessee statute in *Burson, supra*, but one which operates within 600 feet of a polling place, would similarly fail to pass constitutional muster. After all, the more narrowly tailored a statute is, the less protected speech it reaches, and concomitantly the less it impinges upon First Amendment freedoms. The "modified 'burden of proof'" test announced by the *Burson* plurality does not dictate that we consider whether, in achieving its goals, there are no alternatives available to the State which are less burdensome on First Amendment freedoms. Rather, we are required only to examine the extent to which the means chosen by the State burdens the exercise of First Amendment rights, *i.e.* whether those rights are "significantly impinged" by the State action.

We stress that there is no mathematical formula which marks the zones of permissible and impermissible regulation of speech, no " 'litmus- paper test' that will separate valid from invalid restrictions." *Burson, supra*, —— U.S. at ——, 112 S.Ct. at 1857, *quoting Anderson v. Celebrezze*, 460 U.S. 780, 789, 103 S.Ct. 1564, 1570, 75 L.Ed.2d 547 (1983), *quoting Storer v. Brown*, 415 U.S. 724, 730, 94 S.Ct. 1274, 1279, 39 L.Ed.2d 714 (1974). The constitutional problem with LSA-R.S. 18:1462(A)(3) and (4), as construed by this Court in our response to the Fifth Circuit's certified question, is not that their effect reaches as far as 600 feet from polling places.[22] Nor are these subsections invalid

[22]Jerry Fowler, the Commissioner of Elections, testified at the hearing on the motion to quash that the effective range of the statute was changed from the prior 300 foot threshold to a 600 foot radius in response to specific incidents in a 1979 election. In addition, the federal Fifth Circuit, albeit upon consideration of a different record, concluded that "[o]nly after the 300-foot limitation failed to remedy the poll worker problem did the legislature take the next step to 600 feet." *Schirmer, supra*, 2 F.3d at 122. We note these facts in

solely because they impose a prophylactic ban upon all political speech; we have already stated earlier in this opinion that we read *Burson* to approve such comprehensive restrictions within 100 feet of polling places. Rather, today we hold only that when both of these aspects of the challenged provisions operate in tandem, extending a total ban on political speech to a distance of 600 feet from polling places, the resulting limitation of free speech at that point overburdens or "significantly impinges" First Amendment freedoms. The *Burson* plurality found "it sufficient to say that in establishing a 100 foot boundary, Tennessee is on the constitutional side of the line;" we find it sufficient to say that in establishing a 600 foot boundary which proscribes all manner of political speech, not just speech related to matters on the ballot, Louisiana has crossed that line.

D. The Constitutionality of LSA-R.S. 18:1462(A)(2)

Our decision to strike LSA-R.S. 18:1462(A)(3) and (4) as unconstitutionally overbroad does not complete our consideration of this case. Schirmer was also charged with a violation of LSA-R.S. 18:1462(A)(2), which makes it a crime to remain within 600 feet of a polling place after being given written instructions to leave by a poll commissioner or law enforcement officer. Since the constitutionality of this subsection of the statute was also implicated by the district court's quashing of the information, it is necessary to consider the constitutionality of this subsection of the statute as well.

LSA-R.S. 18:1462(A)(2) presents something of a different problem than subsections (3) and (4) of the statute since it does not on its face strike at protected speech. Rather, it affects only certain conduct, namely the act of remaining at a polling place after having received written instructions to depart.

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conjunction with the observation that our decision today does not include any ruling concerning the constitutionality of the 600 foot statutory range *alone*.

This Court earlier visited this subsection of the statute in *State v. Stilley*, 416 So.2d 928 (La.1982), which also involved the prosecution of a defendant for refusing to leave the premises of a polling place after being instructed to do so. At the time of the *Stilley* decision, LSA-R.S. 18:1462(A)(2) made it a criminal offense "[t]o loiter within (600 feet) of any polling place." After considering the inherent vagueness of the term "loiter," the Court noted that "[a]lmost any citizen within a six hundred foot radius of a polling place . . . could be charged with loitering." *Stilley, supra*, at 929. In addition, the Court observed that "[a] criminal statute is unconstitutionally overbroad if its enforcement must necessarily be arbitrary." *Id.* Based upon these observations, the Court concluded that "the statute in question is both vague and overbroad," and accordingly declared it an unconstitutional exercise of legislative authority. *Id.*

The Legislature promptly acted to amend the statute. *See* La.Acts 1982, No. 778, § 1. The amended version of LSA-R.S. 18:1462(A)(2), the one now before the Court, makes it a crime for any person to remain within 600 feet of a polling place "after having been directed, in writing, by an election commissioner or law enforcement officer to leave the premises or area of a polling place."[23] The current subsection (2) of the statute, while criminalizing the refusal to leave a polling site after being instructed to do so by designated authorities, offers no guidelines to election commissioners or law enforcement officers regarding when it is proper to instruct a person to leave the vicinity of a polling site. Thus, the criminality of such conduct is a matter solely within the discretion of the official on the scene.

LSA-R.S. 18:1462(A)(2) no longer suffers from the vagueness that plagued its earlier incarnation, *i.e.*, it now gives ade-

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[23]LSA-R.S. 18:1462(A)(2) makes it clear that the prohibition does not apply when one is "exercising the right to vote."

quate notice to the general public of what conduct is criminal. *See State v. David*, 468 So.2d 1126, 1128-1129 (La.1984), cert denied, 476 U.S. 1130, 106 S.Ct. 1998, 90 L.Ed.2d 678 (1986). However, the updated version still suffers from the infirmities which concerned the *Stilley* Court, *i.e.*, any citizen within 600 feet of a polling place may still be charged with a crime, and "enforcement must necessarily be arbitrary." While the Legislature may of course act to define criminal conduct, "[i]t cannot constitutionally do so through the enactment and enforcement of [a statute] whose violation may entirely depend upon whether or not a policeman is annoyed." *Coates v. Cincinnati*, 402 U.S. 611, 614, 91 S.Ct. 1686, 1688, 29 L.Ed.2d 214 (1971).

The United States Supreme Court has "recognized . . . that the more important aspect of the vagueness doctrine 'is not actual notice, but the other principal element of the doctrine — the requirement that a legislature establish minimal guidelines to govern law enforcement.'" *Kolender v. Lawson*, 461 U.S. 352, 358, 103 S.Ct. 1855, 1859, 75 L.Ed.2d 903 (1983), *quoting Smith v. Goguen*, 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974). We have recognized the compelling interest which the State has in maintaining the orderliness and integrity of the election process, but "[a]s weighty as this concern is, . . . it cannot justify legislation that would otherwise fail to meet constitutional standards for definiteness and clarity." *Kolender, supra*, 461 U.S. at 361, 103 S.Ct. at 1863 (*citation omitted*).[24]

We do not say that the Legislature cannot place limitations upon persons remaining in and around the environs of a polling place; in fact, we have already stated that such limitations are often necessary to the efficient functioning of the elec-

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[24]Although vagueness is a doctrine rooted in due process and not the First Amendment, we note that the State's design contains the "potential for arbitrarily suppressing First Amendment liberties." *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 91, 86 S.Ct. 211, 214, 15 L.Ed.2d 176 (1965).

toral process. We merely hold that the existence of such limitations cannot depend solely upon the whim and caprice of the official on-the-spot. *See State v. Broom*, 439 So.2d 357, 369 (La.1983) (*plurality opinion*). While we recognize that the State's Executive branch and district attorneys are accorded some discretion in the manner in which they enforce and prosecute criminal statutes, it is solely the province of the Legislature to designate the boundary between criminal and non-criminal conduct. *See* La. Const. Art. II, § 2; *State v. Truby*, 211 La. 178, 29 So.2d 758 (1947). Accordingly, we find LSA-R.S. 18:1462(A)(2), as currently written, unconstitutionally vague insofar as it fails to set forth adequate guidelines governing when and under what circumstances the provision is to be enforced.

E. LSA-R.S. 18:1462(A)(1)

Since Schirmer was not charged with its violation, we note that this decision in no way concerns the continued viability of LSA-R.S. 18:1462(A)(1), which prohibits voter solicitation within 600 feet of a polling place. In addition, since the legislative enactment of this statute contains a severability clause,[25] the striking of subsections (2), (3), and (4) of LSA-R.S. 18:1462(A) should not be read to suggest any constitutional infirmity on the part of LSA-R.S. 18:1462(A)(1).[26] *See also* LSA-R.S. 24:175.

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[25] If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items, or applications of this Act which can be given effect without the invalid provisions, items, or applications, and to this end the provisions of this Act are hereby declared severable.

La.Acts 1980, No. 810, § 2. *See also* La.Acts 1982, No. 778, § 4.

[26] Although not called upon to do so, we observe that a narrowly tailored statute such as LSA-R.S. 18:1462(A)(1), addressing itself directly to the evils of voter intimidation and in so doing minimizing the "impingement" of First Amendment freedoms, presents a markedly different question from the sort of broad limitation of political speech found unconstitutional *supra*.

III. Summary

In summary, we find LSA-R.S. 18:1462(A), subsections (3) and (4), which ban all political activity, even that unrelated to ballot matters, within 600 feet of a polling place on election days, to be an unconstitutionally overbroad infringement upon the First Amendment of the United States Constitution. In addition, we find LSA-R.S. 18:1462(A)(2) to be unconstitutionally vague. LSA-R.S. 18:1462(A)(1), however, was not charged in the bill of information and therefore is not implicated by this decision. Accordingly, the stricken subsections are hereby severed from the remainder of the statute, leaving LSA- R.S. 18:1462(A)(1) in effect. For these reasons, we affirm the decision of the trial court below quashing the bill of information in this case.

JUDGEMENT OF THE DISTRICT COURT AFFIRMED.

WATSON, Justice, dissenting.

Schirmer v. Edwards, 2 F.3d 117 (5th Cir.1993), U.S. cert. denied, —— U.S. ——, 114 S.Ct. 1396, 128 L.Ed.2d 70, 62 U.S.L.W. 3657, held that LSA-R.S. 18:1462, which prohibits electioneering around polling places, does not violate the First Amendment of the United States Constitution. The federal court applied strict scrutiny to decide that the 600-foot limitation is narrowly drawn to meet Louisiana's compelling interest in establishing a campaign-free zone. The constitutional compromise between the competing interests, i.e., freedom of speech and unimpeded voting, is not overbroad.

For the reasons assigned by the U.S. Fifth Circuit in *Schirmer v. Edwards*, I respectfully dissent.

KIMBALL, Justice, dissenting.

The constitutionality of La.R.S. 18:1462(A) was upheld by the United States Fifth Circuit Court of Appeals in a case involving these same parties. *Schirmer v. Edwards*, 2 F.3d 117 (5th Cir.1993). Applying the strict scrutiny analysis of *Burson v. Freeman*, —— U.S. ——, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992), the Fifth Circuit found La.R.S. 18:1462(A) to be valid under the First Amendment. A petition for certiorari was subsequently denied by the United States Supreme Court. *Recall '92, Inc. v. Edwards*, —— U.S. ——, 114 S.Ct. 1396, 128 L.Ed.2d 70 (1994).

The majority now strikes as unconstitutional the very same statutory provisions considered by the Fifth Circuit in *Schirmer v. Edwards, supra*, and assertedly does so on federal constitutional grounds. However, I see no reason to depart from the federal appellate court's interpretation of federal constitutional law. Although decisions of intermediate federal appellate courts are not binding upon this court, they are persuasive, *State v. White*, 321 So.2d 491 (La.1975), and highly persuasive when based on interpretation of the United States Constitution. For these reasons, I respectfully dissent.

DENNIS, Justice, concurring.

I respectfully concur.

The defendant challenged the constitutionality of La.R.S. 18:1462(A) under the free speech guarantees of both the Louisiana and federal constitutions. Therefore, the appropriate procedure for deciding a case such as this is to analyze state law, including state constitutional provisions, before reaching a federal constitutional claim. *See State v. Hattaway*, 621 So.2d 796 (La.1993) and *State v. Perry*, 610 So.2d 746, 750 (La.1992). Accordingly, I disagree with the majority's pretermission of the state constitutional question. However, because Article I, § 7 of our state constitution grants as broad and arguably broader protection of rights of free speech than the minimum First Amendment safeguards, *Mashburn v. Collin*, 355 So.2d 879, 891 (La.1977), and because I believe that the majority has applied those minimum safeguards correctly, I join in the judgment of the majority.

APPENDIX 2

Supreme Court of Louisiana

FOR IMMEDIATE NEWS RELEASE NEWS RELEASE # 025

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the 9th day of March. 1995, the following action was taken by the Supreme Court of Louisiana in the case(s) listed below:

REHEARING DENIED:

93-KA- 2631 STATE OF LOUISIANA v. THEADORE SCHIRMER (Parish of East Baton Rouge)

MARCUS, J. - would grant a rehearing.

WATSON, J. - concurs and assigns reasons.

KIMBALL, J. - would grant a rehearing.

JOHNSON, J. - not on panel.

VICTORY, J. - would grant a rehearing.

MAR 9 1995

SUPREME COURT OF LOUISIANA

NO. 93-KA-2631

STATE OF LOUISIANA

versus

THEODORE SCHIRMER

ON REHEARING

WATSON, Justice, concurring in denial of rehearing.

On further reflection, and after considering the effect, particularly in urban areas, of a 600-foot (two football fields) prohibition against any type of political speech, I have concluded there is an unreasonable impingement on the United States and the Louisiana Constitutions. Therefore, I concur in the denial of a rehearing.

APPENDIX 3

THE COURT: I think, both sides can agree that the statute in a real sense brings two of our most basic constitutional rights almost head to head. The right to free speech, freedom of expression is butting up against the right to vote. Both of which are basic and fundamental and essential rights in a democracy. The issue is whether the state in deciding that the right of free speech, free expression, or in this case, political expression, stops 600 feet from the voting booth, whether the state is — whether there is a rational basis for that determination and whether the state's election to put the bar at that point is reasonable and is a reasonable restriction of the corresponding — a reasonable enforcement of the right of citizens to vote. I have been reading *Burson versus Freeman* which is the United States Supreme Court case that apparently is the latest expression on that point, and I've been reading it over the weekend and different points of the testimony today. In that case Tennessee's 100-foot boundary was challenged as being an unconstitutional infringement upon the right to vote. Tennessee has — and from what I understand from the opinion and from other resources almost every state in the union has some prohibition on campaign activities within a certain distance from the polls. In Tennessee it was 100 feet. And pretty much the same activities as are covered in 1462 were prohibited in Tennessee in that 100-foot space. The Supreme Court in the *Burson* case found that the 100-foot boundary was not unreasonable. Specifically they stated that in establishing a 100-foot boundary Tennessee is on the constitutional side of the line. Whether that means that 99 feet is too close or 101 feet is too far, I don't know. It also appears from that opinion that the majority of the states enforce a 100-foot boundary, I think, Louisiana is — well, I think, Hawaii is number 1 with a 1000-foot boundary, and Louisiana is number 2 with a 600-foot boundary, and the majority of the states, I think, fall around the 100 to 250-foot

boundary. In reaching their decision in the *Burson* case the Supreme Court didn't really give you a whole lot to go on other than to say there is nothing wrong with a hundred feet. It did state legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively provided that the response is reasonable and does not significantly impinge upon the constitution of protecting rights. And they go on to say that at some measurable distance from the polls governmental regulation of vote solicitation could effectively become an impermissible burden akin to a statute which was struck down in *Miller versus Alabama* which I also read dealt with a statute that prohibited publishing newspaper editorials pro or con on election day. The court quickly struck that down. More recently the Fifth Circuit in *Schirmer versus Edwin Edwards* which, I think, is the federal counterpart of this particular matter noted that the Louisiana statute is six times the distance that was covered in the Supreme Court decision in *Burson*, and the area covered by the 600-foot limitation is approximately 36 times as large as the area that was covered in the *Burson* case, and as I indicated before that we're second only to Hawaii with a restricted radius of 600 feet. The testimony that has been presented of course indicates that the officials charged with enforcing these limits apparently have to wrestle with them every election. But I really didn't hear anything that they have a problem with — that they had a problem with at 100 feet which was the limit in November that would not have also been a problem at 600 feet. That was the reason for my question to Mr. Fowler whether the 100-foot limit which the state was forced to use in November presented any problems — or any different problems than they had in prior elections when the limit was 600 feet. And it was my appreciation of his testimony that there was no unique problem, nothing that they wouldn't have had had the distance been six times greater. The

fact that the limit was increased to 600 feet following — was that the '72 election with Lambert? That may be the reason that it was increased to that distance, but the court just doesn't see a rational basis for that greater distance. In your motion to quash you allege that the statute is unconstitutional because of overbreadth, that it goes farther than necessary to achieve the result that is desired. And insofar as that refers to the fact that political activity is prohibited within 600 feet of a polling place, I agree and on that basis alone and no other. The other bases that you allege I do not find to be persuasive, but I do feel that the statute as written is overly broad and that the objectives that it seeks to achieve can just as easily and just as conveniently be achieved without that great an intrusion upon the right of speech and expression. So to that extent, to the extent that the statute prohibits such activities within 600 feet of a polling place I do find it to be unconstitutional. The motion to quash will be granted.

MR. UPTON: Thank you, Your Honor.

MR. MARCANTEL: Thank you, Your Honor. Please, note the state's objection —

THE COURT: Note the state's objection and assignment of error.

MR. MARCANTEL: That's correct, and the state would move for at this time an application to take writs on this matter.

THE COURT: Okay.

End of transcript

CERTIFICATE

I, Lanell Didier, Official Court Reporter, 19th Judicial District Court, Parish of East Baton RougE, State of Louisiana, do hereby certify that the foregoing pages constitute a true and correct transcript of the aforesaid matter to the best of my knowledge and ability.

Witness my hand, this 15th day of September, 1993.

/s/ Lanell Didier
Official Court Reporter
19th Judicial District Court

APPENDIX 4

The Supreme Court of the State of Louisiana

THEODOR A. SCHIRMER, ET AL

VS NO. 92-CQ-282

EDWIN W. EDWARDS, ET AL

———————

IN RE: United States 5th Cir.Ct./Appeal; (Plaintiff(s); Applying for Certified Question; U.S. Fifth Circuit Court of Appeal Number 92-868-B.

———————

October 29, 1992

Certification granted. See per curiam.

WFM
PFC
JCW
HTL
LFC
PH

DENNIS, J., concurs with reasons.

Supreme Court of Louisiana
October 29, 1995
/s/
Clerk of Court
For the Court

SUPREME COURT OF LOUISIANA

NO. 92-CQ-2829

THEODOR A. SCHIRMER, ET AL.

V.

EDWIN W. EDWARDS, ET AL.

CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PER CURIAM

Pursuant to Rule XII of the Rules of the Supreme Court of Louisiana, the United States Court of Appeals for the Fifth Circuit certified the following question to this court:

> Whether La. R.S. 18:1462A proscribes on election day, outside of the polling place itself but within a radius of six hundred feet from the entrance thereto, all solicitation of signatures for a recall petition that is not on the ballot that is to be voted on at the election for which the polling place is open, and in the polling place or said six hundred foot radius all wearing of clothing or buttons bearing visible words or symbols supportive of such recall?

We granted certification, and now proceed to answer the question.[1]

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[1]We note that our opinion deals only with the question certified, and we do not pas on any issues of constitutionality under either the United States Constitution or the Louisiana Constitution.

Dennis J. concurs. Although the statute does not prohibit sure speech or political activity dissociated from the election at hand unless it is combined with political advertising or the display or distribution of campaign literature, the plaintiffs on the present case seek to carry out such a combination of activities on election day.

La. R.S. 18:1462(A) provides:

§ 1462. Acts prohibited on election day; electioneering; exception; enforcement; penalty

A. Except as otherwise specifically provided by law, it shall be unlawful for any person, between the hours of 6:00 a.m. and 9:00 p.m., to perform or cause to be performed any of the following acts within any polling place being used in an election on election day or within any place wherein absentee voting is being conducted, or within a radius of six hundred feet of the entrance to any polling place being used in an election on election day or any place wherein absentee voting is being conducted:

(1) To solicit in any manner or by any means whatsoever any other person to vote for or against any candidate or proposition being voted on in such election.

(2) To remain within any such polling place or place wherein absentee voting is being conducted or within a radius of six hundred feet of the entrance of any such polling place, except when exercising the right to vote, after having been directed, in writing, by an election commissioner or law enforcement officer to leave the premises or area of a polling place or after having been directed, in writing, by a registrar or deputy registrar to leave the place wherein absentee voting is being conducted.

(3) *To hand out. Place. or display campaign cards. pictures. or other campaign literature of any kind or description whatsoever.*

(4) *To Place or display political signs pictures. or other forms of political advertising.*

[emphasis added].

We find the clear intent of this statute, when taken as a whole,

is to prohibit political activity within 600 feet of the polls on election day in order to prevent disruption of the polling place and the election process. Although we agree that subsection (1) does not apply to the present case, we believe subsections (3) and (4) *clearly proscribe the conduct at issue.* Subsection (3) prohibits the *handing out*, placement or *display* of *campaign literature* "of any kind or description whatsoever." We find the solicitation of signatures for a recall petition not on the ballot at that election, but which its backers ultimately hope to get on the ballot, fits this broad definition of handing out or displaying campaign literature. Likewise, we hold the wearing of clothing or buttons supporting such a recall effort is a display of political advertising prohibited by subsection (4). Accordingly, we answer the certified question in the affirmative.[2]

DECREE

For the reasons assigned, we answer the certified question as follows:

> La. R.S. 18:1462(A)(3) proscribes on election day, outside of the polling place itself but within a radius of six hundred feet from the entrance thereto, all solicitation of signatures for a recall petition that is not on the ballot that is to be voted on at the election for which the polling place is open. La. R.S. 18:1462(A)(4) proscribes in the polling place or said six hundred foot radius all wearing of clothing or buttons bearing visible words or symbols supportive of such recall.

It is ordered that, pursuant to Supreme Court Rule XII, § 9, the clerk of this court send this judgment under the seal of this court to the United States Court of Appeals for the Fifth Circuit and to the parties.

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[2]We note that Attorney General of Louisiana, in opinion no. 92-650(A), reached a similar conclusion, as did the court of appeal in an unpublished opinion, *Lacour v. State of Louisiana*, 90-C-1772 (La. App. 4th Cir. 1990).

APPENDIX 5

Theodor A. SCHIRMER, et al., Plaintiffs,

Shelley E. Corrington, Individually, et al., Plaintiffs-Appellants,

v.

Edwin W. EDWARDS, Governor of the State of Louisiana, and in his official capacity, et al., Defendants-Appellees.

No. 92-3900.

United States Court of Appeals,
Fifth Circuit.

Sept. 17, 1993.

Louisiana voters who were members of political organization seeking to recall governor brought suit challenging constitutionality of Louisiana statute proscribing campaign activity within 600-foot radius of polling places. The United States District Court for the Middle District of Louisiana, Frank J. Polozola, J., denied challenge, and plaintiffs appealed. After question certified to the Louisiana Supreme Court was answered, 608 So.2d 948, the Court of Appeals, Reynaldo G. Garza, Circuit Judge, held that: (1) statute is valid under the First Amendment, as Louisiana has compelling interest in providing for campaign-free zone around its polls, and geographic limitation is narrowly tailored to achieve compelling governmental interests, and (2) statute's application to political speech of individuals not on the ballot and buttons and t-shirts did not render it overbroad.

Affirmed.

1. Constitutional Law •90.1(1.2)

Louisiana statute proscribing campaign activity within 600-foot radius of polling places was not a content-neutral time, place, or manner restriction and was subject to strict scrutiny. LSA-R.S. 18:1462; U.S.C.A. Const.Amend. 1.

2. Constitutional Law •90.1(1.2)
Elections •311

Under the strict scrutiny test, Louisiana statute proscribing campaign activity within a 600-foot radius of polling places does not violate the First Amendment; state had compelling interest to protect its citizens' right to vote, and geographic limitation was narrowly tailored to achieve such interest. LSA-R.S. 18:1462; U.S.C.A. Const.Amend. 1.

3. Constitutional Law •90.1(1.2)
Elections •311

Louisiana statute proscribing campaign activity within 600-foot radius of polling places is not overbroad on ground that it applies to political speech of individuals not on the ballot and buttons and t-shirts; total ban on politicking within campaign-free zone was necessary to preclude need for on the spot enforcement. LSA-R.S. 18:1462; U.S.C.A. Const.Amend. 1.

Theodor A. Schirmer, Malibu, CA, Katherine Wheeler, Baton Rouge, LA, for plaintiffs.

James M. Ross, Roy Achille Mongrue, LA Dept. of Justice, Angie Rogers La Place, Asst. Atty. Gen., Baton Rouge, LA, for defendants-appellees.

Appeal from the United States District Court for the Middle District of Louisiana.

Before POLITZ, Chief Judge, and REYNALDO G. GARZA, and JOLLY, Circuit Judges.

REYNALDO G. GARZA, Circuit Judge:

Appellants appeal the district court's adverse judgment, which denied their constitutional challenge to Louisiana's campaign-free zone codified at LSA-R.S. 18:1462. Persuaded that Louisiana has a compelling interest in creating a campaign-free zone, and that the statute is narrowly drawn to achieve that end we AFFIRM.

FACTS

The plaintiffs-appellants are a group of Louisiana voters, who are members of the political organization called Recall '92, Inc. The principal objective of the group is to recall Louisiana Governor Edwin Edwards. The recall procedure, which is codified at LSA-R.S. 18:1300.1 et seq., requires signatures on a recall petition of not less than one-third of the total electors of the voting area, collected and submitted within a 180-day period.[1]

In order to further their effort, the appellants seek to establish that LSA- R.S. 18:1462 is unconstitutional.[2] Section 1462 as interpreted by the Louisiana Supreme Court:

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[1]In essence, this would require about 750,000 signatures.

[2]The current version of Section 1462 reads as follows:

> § 1462. Acts prohibited on election day; electioneering; exception; enforcement; penalty A. Except as otherwise specifically provided by law, it shall be unlawful for any person, between the hours of 6:00 a.m. and 9:00 p.m., to perform or cause to be performed any of the following acts within any polling place being used in an election on election day or within any place wherein absentee voting is being conducted, or within a radius of six hundred feet of the entrance to any polling place being used in an election on election

> [P]roscribes on election day, outside of the polling place itself but within a radius of six hundred feet from the entrance thereto, all solicitation of signatures for a recall petition that is not on the ballot that is to be voted on at the election for which the polling place is open. [Section 1462] proscribes in the polling place or said six hundred foot radius all wearing of clothing or buttons bearing visible words or symbols supportive of such recall.[3]

Prior to the November 3, 1992 election, appellants brought suit to enjoin the application of Section 1462 so that they would be able to obtain the required amount of signatures within the 180-day window. The appellants sought to circulate petitions, obtain signatures, wear buttons, display paraphernalia, and

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day or any place wherein absentee voting is being conducted:

(1) To solicit in any manner or by any means whatsoever any other person to vote for or against any candidate or proposition being voted on in such election.

(2) To remain within any such polling place or place wherein absentee voting is being conducted or within a radius of six hundred feet of the entrance of any such polling place, except when exercising the right to vote, after having been directed, in writing, by an election commissioner or law enforcement officer to leave the premises or area of a polling place or after having been directed, in writing, by a registrar or deputy registrar to leave the place wherein absentee voting is being conducted.

(3) To hand out, place, or display campaign cards, pictures, or other campaign literature of any kind or description whatsoever.

(4) To place or display political signs, pictures, or other forms of political advertising. LSA-R.S. § 1462.

[3]The statement on the application of Section 1462 was issued by the Louisiana Supreme Court in response to the prior panel's certification of the question while the temporary restraining order pending appeal was considered and granted.

pass out other materials to support their cause at the November 3, 1992 election. There was nothing on the ballot pertaining to the recall effort.

On October 3, 1992, Theodor Schirmer was not permitted to vote with a Recall 92 T-shirt at one location, and then at another location was arrested for violating Section 1462 by attempting to solicit signatures on a recall petition. Shelley Corrington was also not permitted to vote because she was wearing a T-shirt advertising the recall effort. There were numerous other plaintiffs, who had similar experiences in forwarding the recall drive.

PROCEDURE

The plaintiffs brought suit in the Middle District of Louisiana pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3) and (4) seeking declaratory and injunctive relief against the application of the campaign-free zone. On October 19 and 20, 1992, the district court conducted a two-day trial to determine the constitutionality of LSA-R.S. § 18:1462.

The plaintiffs launched three grounds of attack on Section 1462: (i) the statute placed an excessive burden on their First Amendment rights because it proscribed campaign activity within a 600-foot radius around polling places; (ii) even if constitutional, Section 1462 only applied to issues or persons on the ballot; or alternatively (iii) the statute was enforced in a discriminatory and content-rooted manner in derogation of the plaintiffs' First Amendment rights.[4]

The district court, relying principally on *Burson v. Freeman*, —— U.S. ——, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992), found that

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[4]The district court declined to rule on the plaintiffs' discriminatory application claims—persuaded that the issue would be better raised as a defense to a state court criminal action. The appellants combine this argument with their void for vagueness defense.

the statute was constitutional. The court determined that Section 1462 created a constitutional campaign-free zone around polling areas, and applied to both issues and parties whether or not they were on the ballot.

The plaintiffs appealed to the Fifth Circuit, and in the interim sought temporary injunctive relief pending appeal. The district court denied plaintiffs' application for a temporary restraining order; however, an earlier panel of this court granted plaintiffs' motion for an injunction pending appeal. See *Schirmer v. Edwards*, No. 92-3900 (5th Cir. Oct. 29, 1992). At long last, we are now able to render a final decision on appellant's claims.

DISCUSSION

The appellants assert on appeal that Section 1462 is invalid under the First and Fourteenth amendments. They contend: (i) Louisiana does not have a compelling interest in providing for a 600-foot campaign-free zone around its polls; (ii) even if the state has a compelling interest in a campaign-free zone, the statute is not narrowly tailored to achieve that interest because 600 feet is excessive; (iii) the statute is facially invalid because its content restriction is substantially overbroad; and (iv) the statute is void for vagueness.

We find that: (i) Louisiana has a compelling interest in maintaining campaign-free zones on election day; (ii) the statute is narrowly tailored to achieve that compelling interest; (iii) the statute is not substantially overbroad; and (iv) we need not address the void-for-vagueness argument. Therefore, the district court's decision is AFFIRMED.

i. Does Louisiana have a Compelling Interest in Maintaining a Campaign-Free Zone around its Polls During Elections?

Section 1462 posits the First Amendment's guarantee of the right to free speech against the state's attempt to secure its citi-

zens' right to vote in an environment free from intimidation, harassment, confusion, obstruction, and undue influence. This conflict of First Amendment rights necessarily requires a compromise between the two. The Supreme Court addressed this issue head on last term in *Burson v. Freeman*, — U.S. ——, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992).

In *Burson*, the court found a Tennessee Statute that proscribed campaign activity within a 100-foot radius of its polls on election day to be constitutional. The court found that the statute implicated three First Amendment concerns: (i) regulation of political speech; (ii) regulation of speech in a public forum; and (iii) regulation of speech based on content. The *Burson* plurality[5] found that a content-based restriction on political speech in a public forum is subject to strict scrutiny.[6] Strict scrutiny requires Louisiana to show that Section 1462 is narrowly tailored to achieve a compelling governmental interest. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 954, 74 L.Ed.2d 794 (1983).

Undeniably, both the Tennessee statute and Section 1462 are content-based restrictions. Each singles out and sanctions public discourse on politics—an area deep within the confines

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[5]Justice Blackmun wrote the plurality opinion that Chief Justice Rehnquist, and Justices White and Kennedy joined. Justice Kennedy filed a concurring opinion. Justice Scalia filed an opinion concurring in the judgment. Justice Stevens wrote the dissent, which was joined by Justices O'Connor and Souter. Justice Thomas took no part in the decision.

[6]Justice Scalia concurred in the judgment of the court. In doing so, he concluded that the regulation at issue was a reasonable viewpoint — neutral regulation of speech in a non-public forum. Justice Scalia concluded that the areas adjacent to a polling forum on or near election day do not constitute a traditional public forum and, thus, the statute should not be subjected to the strict scrutiny standard. See *Burson*, — U.S. at ——, 112 S.Ct. at 1859-61 (Scalia, J., concurring) (citing *Greer v. Spock*, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976)).

of the First Amendment. *See, e.g., Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 223, 109 S.Ct. 1013, 1020, 103 L.Ed.2d 271 (1989) (citations omitted) ("the First Amendment has its fullest and most urgent application to [political] speech"). Clearly, Section 1462 does not apply to any other type of speech.[7] Consequently, the statute is not a content-neutral time, place, or manner restriction and, thus, is subject to strict scrutiny.

Moreover, the statute must still be constitutionally gauged under the strict scrutiny standard even though it is viewpoint-neutral. *See, e.g., Boos v. Barry*, 485 U.S. 312, 319, 108 S.Ct. 1157, 1162, 99 L.Ed.2d 333 (1988) (viewpoint-neutral statute that prohibited use of signs within 500 feet of foreign embassies content-based); *see also Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 537, 100 S.Ct. 2326, 2333, 65 L.Ed.2d 319 (1980) ("[t]he First Amendment's hostility to content-based restrictions extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion on an entire topic").

In *Burson*, the state of Tennessee proffered two grounds upon which to support its compelling interest in a campaign-free zone: (i) the protection of its citizens' right to vote freely for the candidate of their choice; and (ii) the protection of the right to vote in an election that is conducted with integrity and reliability. The Supreme Court agreed that these interests were compelling, but the court noted that "[t]o survive strict scrutiny . . . a state must do more, . . . it must demonstrate that the law is necessary to serve the asserted interest." Id., — U.S. at ——, 112 S.Ct. at 1852.

The court traced the longstanding history of election problems that fostered the need for reform, which led to the Ten

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[7]The court below noted that it would be permissible to advocate on the freedom of choice or even to sell Tupperware in the campaign-free zone.

nessee statute in *Burson*, as well as Section 1462. See id., — U.S. at ——, 112 S.Ct. at 1852-55. The court noted that the two-fold problem that these regulations were enacted to cure was: (i) voter intimidation; and (ii) election fraud. *Id.*, — U.S. at — —, 112 S.Ct. at 1855. Finally, the plurality concluded that "wide-spread and time-tested consensus demonstrates that some restricted zone is necessary in order to serve the States' compelling interest in preventing voter intimidation and election fraud." *Id.* [8]

Louisiana State Representative Charles Lancaster, who authored the 1980 amendments to Section 1462, testified before the court below. The 1980 amendments expanded the campaign-free zone from 300 feet to 600 feet. Representative Lancaster testified that the statute primarily sought to guard against: (i) voter intimidation; (ii) voter harassment; and (iii) to provide unobstructed access to the polls. Lancaster testified that the problem largely emanated from poll workers, who bombarded voters in and around the polls. Apparently, it was common practice to use poll workers to inundate voters just prior to their entry to the polls. The legislature felt compelled to remedy the situation statutorily. The intent of the statute was to encourage voter participation. Under the statutorily created campaign-free zone, voters are free to vote without passing through a gauntlet of poll workers.

We conclude that Louisiana undoubtedly has a compelling interest to protect its citizens' right to vote. *Burson* reaffirmed that states have a compelling interest in protecting the right to vote—"a right at the heart of our democracy." *Burson*, — U.S. at ——, 112 S.Ct. at 1851; *see also Anderson v. Celebrezze*, 460 U.S.

[8]The dissent interpreted the purpose of the statute somewhat differently reasoning that the statute served: (i) to protect orderly access to the polls; and (ii) to prevent last-minute campaigning. Id., — U.S. at ——, 112 S.Ct. at 1861 (Stevens, J., dissenting).

780, 788 n. 9, 103 S.Ct. 1564, 1570 n. 9, 75 L.Ed.2d 547 (1983).

ii. Is the 600-Foot Limitation in Section 1462 Narrowly Tailored to Protect Louisiana's Compelling Interest?

Given the fact that Louisiana has a compelling interest in establishing a campaign-free zone, the question then becomes whether 600 feet is a valid limitation. Interestingly, Louisiana's statute is the second largest limitation in the country. Hawaii's 1,000-foot campaign-free zone is the largest in the country. See Haw.Rev.Stat. §§ 11-132 & 19-6(7). [9]

It is difficult to demarcate the point where the state's compelling interest in a campaign-free zone ceases and beyond which any content-based infringement becomes unconstitutional. The *Burson* court recognized this when it held "that some restricted zone around the voting area is necessary to secure the State's compelling interest." *Burson*, —— U.S. at ——, 112 S.Ct. at 1856 (emphasis in original). Justice Blackmun tempered this statement when he reasoned "at some measurable distance from the polls . . . governmental regulation ... could effectively become an impermissible burden akin to the statute struck down in *Mills* v. *Alabama*, 384 U.S. 214, 86 S.Ct. 1434, 16 L.Ed.2d 484 (1966)."[10]

The appellees contend that the state is not required to prove that the 600- foot zone is perfectly tailored, as long as it does not *significantly impinge* on constitutionally protected

[9]Texas prohibits campaigning with a car microphone within 1,000 feet of the polling place on election day. See Tex.Elec.Code Ann. s 61.004.

[10]In *Mills*, the Supreme Court struck down a statute that made it a crime for a newspaper editor to publish political editorials on election day. *Mills*, 384 U.S. at 220, 86 S.Ct. at 1437. Interestingly, the *Mills* opinion distinguished the present situation when it admonished "[w]e should point out at once that this question in no way involves the extent of a state's power to regulate conduct in and around the polls in order to maintain peace, order, and decorum there." *Id.* at 218, 86 S.Ct. at 1436-37.

rights.[11] The *Burson* plurality concluded that Tennessee's campaign-free zone represented only a "minor geographic limitation" that did not significantly impinge upon constitutionally protected rights. *Burson*, —— U.S. at ——, 112 S.Ct. at 1857. Justice Blackmun explained "we simply do not view the question whether the 100-foot boundary line could be somewhat tighter as a matter of *'constitutional dimension. Munro v. Socialist Workers Party*, 479 U.S. 189, 197 [107 S.Ct. 533, 538, 93 L.Ed.2d 499] (1986). Reducing the boundary [line] *is a difference only in degree, not a less restrictive alternative in kind." Burson*, —— U.S. at ——, 112 S.Ct. at 1857 (emphasis added) (*citing Buckley v. Valeo*, 424 U.S. 1, 30, 96 S.Ct. 612, 640, 46 L.Ed.2d 659 (1976)). This statement reflects the difficulty that lies in determining the exact point at which to draw the line, and it suggests that the plurality would have supported a 600- foot limitation.

The appellants point to the numerous exit-polling cases that have invalidated much smaller restrictions around polling areas. For example, in *Daily Herald Co. v. Munro*, 838 F.2d 380 (9th Cir.1988), the Ninth Circuit held a 300-foot restriction on exit-polling to be unconstitutional on its face. *Id.* at 389 (the content-based statute was not narrowly tailored). *Daily Herald* is representative of many cases holding that much smaller lim-

[11]The genesis of the "significantly impinge" language found in the Burson plurality's opinion came from Munro, 479 U.S. at 196, 107 S.Ct. at 537.

> [R]equiring proof that a 100-foot boundary is perfectly tailored to deal with voter intimidation and election fraud 'would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight, rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutional rights.'

Burson, —— U.S. at ——, 112 S.Ct. at 1857 (emphasis in original) (quoting *Munro*, 479 U.S. at 195-96, 107 S.Ct. at 537-38).

itations do not survive strict scrutiny in the exit polling context. *See, e.g., National Broadcasting Co., Inc., v. Cleland,* 697 F.Supp. 1204, 1215 (N.D.Ga.1988) (holding 150-foot exit-polling limitation not narrowly drawn, but construed to be constitutional up to 25 feet). We reject the application of the exit-polling cases to the present context because the underlying state interests differ in each case. While there is no evidence of widespread voter harassment or intimidation by exit-pollers, there is evidence that poll workers do create these problems. Consequently, the state's compelling interest is called to greater heights in creating a campaign-free zone.

Further, Representative Lancaster testified that the 300-foot limitation, which preceded the 1980 amendments, did not prevent the continued hiring of poll workers. The 600-foot limitation was created to dissuade politicians from hiring poll workers. Poll workers were one of the principal causes of voter intimidation and harassment that was perceived to be causing low voter turnout. Further, according to Lancaster, the 600-foot limitation has served its purpose and poll workers are no longer used.

The Louisiana legislature tried to utilize a 300-foot campaign-free zone to protect its citizens' rights to vote. The legislature, thus, found a less restrictive alternative inadequate. Only after the 300-foot limitation failed to remedy the poll worker problem did the legislature take the next step to 600 feet. Therefore, we find that Section 1462's geographic limitation is narrowly tailored to achieve a compelling governmental interest. [12]

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[12]While we have found that Louisiana's campaign-free zone is narrowly tailored, we note that in *Clean-Up '84 v. Heinrich,* 759 F.2d 1511, 1514 (11th Cir.1985), the Eleventh Circuit held that a 100-yard (300-foot) campaign-free zone was unconstitutionally overbroad. *Id.* (cited by the *Burson* dissent). Further, the only post-*Burson* case to directly address the campaign-free

iii. Is Section 1462 Substantially Overbroad?

The appellants next contend that Section 1462 is overbroad because it applies to: (1) the political speech of individuals not on the ballot ("non-ballot political speech"); and (2) buttons and T-shirts ("passive political speech").[13]

The appellants argue that Louisiana does not have a compelling interest in banning non-ballot political activity nor passive political speech around the polls. Appellees offer two defenses with regard to Section 1462's total ban on political speech: (i) if only ballot-related campaigning were proscribed voter intimidation and harassment problems would still exist because of enforcement and security problems; and (ii) solicitation for a recall petition has a greater disruptive potential than all other political speech.

The first argument, that suppression of ballot-related activity alone is insufficient, is rooted in the argument that ballot campaigners could achieve their ends by posing as non-ballot campaigners in order to gain access to the confines of the forbidden 600-foot radius. Representative Lancaster and Representative Accardo testified that an across-the-board ban on politicking was necessary to protect voters' rights because any

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zone issue appears to be *Calchera v. Procarione*, 805 F.Supp. 716 (E.D.Wisc.1992). The *Calchera* decision focused on the plurality opinion in Burson and noted the opinion's statement that at some point a campaign-free zone would be over-inclusive. The court held that the statute's 500-foot proscription was overbroad, and noted that it imposed a much greater infringement on the First Amendment than the 100-foot limitation addressed in *Burson*. *See Calchera*, 805 F.Supp. at 719-20. However, the Wisconsin statute in *Calchera* was found to prohibit homeowners from expressing th political views on their own property. The district court grasped on this factor to distinguish *Burson*. *See id.* at 720. There is no evidence in the record before us that the Louisiana statute is applied similarly.

[13]We will use the term "passive political speech" to refer to buttons and t-shirts.

exceptions to the total ban on political speech would necessarily create the need for on the spot enforcement.

Lancaster and Accardo stated that to allow any politicking in the campaign- free zone would open the door to subterfuge. If some people were allowed to engage in political speech in the campaign-free zone it would create two problems: (i) on-the-spot enforcement decisions about what was proscribed by the statute; and (ii) increased security needed to weed out those engaged in ballot related speech.

To avoid this morass the legislature decided that a total ban was necessary. They reasoned that if they had to police the campaign-free zone to the extent necessary to weed out the disguised poll workers, then voters would still be intimidated and harassed. The heightened security itself would no doubt result in voter intimidation—the evil they sought to cure. Further, problems with on the spot decision making and varying degrees of enforcement would result in uneven application of the statute. Consequently, Section 1462 is not overbroad.

Justice Stevens, in his dissent in *Burson*, made the only known reference with regard to proscribing non-ballot campaigning around polling areas. Justice Stevens noted that the Tennessee statute did not apply to "political debate and solicitation concerning issues or candidates *not on the day's ballot.*" *Burson*, —— U.S. at ——, 112 S.Ct. at 1864 (Stevens, J., dissenting) (emphasis added). Stevens also noted that the Tennessee statute did not prohibit exit polling, leaflets, posters or buttons. He reasoned that these factors "severely undercut[ ] the credibility of [Tennessee's] purported law-and-order justification." Id. (Stevens, J., dissenting). These statements suggest that Justice Stevens would be more comfortable with an across the board ban on politicking in the campaign-free zone based on the same logic forwarded by Representatives Lancaster and Accardo. In any event, the issue of proscribing non-ballot cam-

paigning was not an issue in *Burson* and appears to be an issue of first impression.

The appellees further argue that there is an important distinction between a recall petition and other campaign-related activity. In all other campaign activity the voter is free to exercise his rights in a secret ballot booth after having weighed and observed all campaigning activity whether it be far or near the polling venue. However, in the recall petition context, even if there is no recall on the ballot, voters must either sign the petition on the spot or the parties seeking their signature will immediately know that they have been rejected. The appellees contend that this renders the state's compelling interest to protect the voter to be even greater when weighed against the First Amendment rights of those seeking to forward the recall effort.

This argument is forceful and it is true that this distinction is meaningful. However, Section 1462 does not target only recall petitions nor does it even mention them. Further, there is no evidence that the legislature considered the 600-foot limit with regard to recall petitions in 1980 when it was amended.[14]

Accordingly, we find that a total ban on politicking within the campaign-free zone is not overbroad. In fact, the total ban in the present context is the most defensible position. The state has a compelling interest in protecting its voters and the proffered reasons given by the legislature demonstrate a reasonable compromise to the problems that necessitated the campaign- free zone in the beginning.

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[14]Since the advent of this case Louisiana has enacted a statute that expressly creates a campaign-free zone applicable only to recall petitions. LSA-R.S. s 18:1300.6. We express no opinion as to the constitutionality of Section 1300.6.

iv. Is Section 1462 Void For Vagueness?

The appellants challenge Section 1462 on vagueness grounds contending that it is void because it is subject to discriminatory enforcement and fails to provide fair notice. The district court found that this issue would be better suited as a defense to a criminal prosecution. The Burson court treated this defense similarly when it stated "[i]n any event, these arguments are "as applied" challenges that should be made by an individual prosecuted for such conduct." *Burson*, — U.S. at — n. 13, 112 S.Ct. at 1857 n. 13.

In light of our prior panel's certification to the Louisiana Supreme Court with regard to the statute's application to non-ballot matters it is clear now that the statute applies to non-ballot matters. However, there was some confusion created by some contrary attorney general opinions issued previously. In any event, the appellants do not appear to be in a position to assert this argument at this time.

CONCLUSION

Louisiana has a compelling interest in establishing a campaign-free zone. The 600-foot limitation is narrowly drawn and not an excessive infringement on the First Amendment. Thus, the geographical limitation survives strict scrutiny. Moreover, the statute creates a total ban on politicking within the zone. The need for a total ban is compelling and Section 1462 is not overbroad. Legislatures must necessarily compromise between two competing First Amendment interests in creating a campaign-free zone. Louisiana's zone has evolved over time and at present represents a constitutional compromise. Further, the appellants' void for vagueness argument is better left to another day. Therefore, the judgment of the district court is AFFIRMED.

Supreme Court, U.S.
FILED
OCT 10 1995
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No. 94-2022

In The

Supreme Court of the United States

October Term, 1995

STATE OF LOUISIANA,

Petitioner,

vs.

THEODOR A. SCHIRMER,

Respondent.

On Petition For Writ Of Certiorari
To The Louisiana Supreme Court

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether the State of Louisiana has a compelling interest in banning all political activity regardless of content, including non-ballot-related activity, within 600 feet of a polling place on election day?

(2) Whether La. R.S. 18:1462A(3) & (4), which enacts a complete ban on all political activity within 600 feet of a polling place on election day, is narrowly tailored to serve a compelling state interest?

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INTRODUCTION

This case involves a First Amendment challenge to Louisiana's electioneering law, La. R.S. 18:1462A(2), (3) & (4). In *State of Louisiana v. Schirmer*, 646 So. 2d 890 (La. 1994), the Louisiana Supreme Court declared sections (3) and (4) of this statute unconstitutional on overbreadth grounds, and section (2) unconstitutional as void for vagueness.[1] The State of Louisiana has requested that this Court grant a writ of certiorari or, in the alternative, order a summary reversal of the Louisiana Supreme Court's decision and uphold the constitutionality of La. R.S. 18:1462A.

Respondent Theodor A. Schirmer agrees that the granting of the writ of certiorari for purposes of reviewing the decision of the Louisiana Supreme Court declaring La. R.S. 18:1462A(2), (3) & (4) unconstitutional is appropriate and necessary to resolve a direct conflict of federal constitutional interpretation between that court and the Fifth Circuit U.S. Court of Appeals.[2] This case implicates First Amendment issues of the highest order that remain unresolved by this Court and presents those

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[1] Without waiving the right to address it on the merits, Respondent will not address that portion of the Louisiana Supreme Court's opinion declaring La. R.S. 18:1462A(2) unconstitutional as void for vagueness.

[2] In addition, there is a conflict between the Fifth Circuit U.S. Court of Appeals and the Eleventh Circuit U.S. Court of Appeals. *Compare, Schirmer v. Edwards*, 2 F.3d 117 (5th Cir. 1993) with *Clean-Up '84 v. Heinrich*, 759 F.2d 1511 (11th Cir. 1985) (holding unconstitutional Florida's electioneering law, which prohibited solicitation of signatures on a petition within 300 feet of a polling place on election day).

issues in a posture particularly well-suited for resolution by this Court. Respondent strongly opposes Petitioner's request in the alternative for summary reversal of the decision of the Louisiana Supreme Court.

STATEMENT OF THE CASE

On October 3, 1992, Respondent was arrested at a polling place at Robert E. Lee High School in East Baton Rouge Parish, Louisiana, and charged with violating La. R.S. 18:1462A(2), (3) & (4).[3] Respondent filed a civil federal declaratory relief action in the U.S. District Court for the Middle District of Louisiana on October 7, 1992, seeking to enjoin enforcement of the statute on the grounds that it violates the First and Fourteenth Amendments to the U.S. Constitution. On October 20, 1992, U.S. District Judge Frank Polozola denied injunctive relief and upheld the statute as constitutional. Respondent appealed to the Fifth Circuit, and sought a temporary injunction pending appeal, which Judge Polozola denied. The Fifth Circuit then certified the following question to the Louisiana Supreme Court regarding the statute's construction:

> Whether La. R.S. 18:1462A proscribes on election day, outside of the polling place itself but within a radius of six hundred feet from the entrance thereto, all solicitation of signatures for a recall petition that is not on the ballot that is to be voted on at the election for which the polling

[3] For purposes of the petition for certiorari, Respondent does not contest Petitioner's version of the underlying facts as set forth in the petition.

> place is open, and in the polling place or said six hundred foot radius all wearing of clothing or buttons bearing visible words or symbols supportive of such recall?

Without passing on the constitutionality of the statute at that time, the Louisiana Supreme Court answered that question in the affirmative. *Schirmer v. Edwards*, 608 So. 2d 948, 948-49 (La. 1992). The Fifth Circuit, relying on *Burson v. Freeman*, 504 U.S. 191, 112 S. Ct. 1846 (1992), then granted a temporary injunction pending appeal, barring enforcement of the statute outside of the 100 foot boundary approved in *Burson*. *Schirmer v. Edwards*, No. 92-3900 (5th Cir. Oct. 19, 1992). *See* App. 1. The State sought a stay of the temporary injunction from this Court, which denied the stay. *Edwards v. Schirmer*, ___ U.S. ___, 113 S. Ct. 444 (1992).

The case was then reassigned to a different panel of the Fifth Circuit to address the merits of the case. That panel, citing *Burson*, found first that Louisiana has a compelling state interest in maintaining "campaign-free zones" on election day. *Schirmer v. Edwards*, 2 F.3d 117, 120-21 (5th Cir. 1993), *cert. denied sub nom., Recall '92 v. Edwards*, ___ U.S. ___, 114 S. Ct. 1396 (1994). The Fifth Circuit then found that the statute was narrowly tailored to achieve that end. Noting that it would be burdensome to require a state to prove that any particular distance is warranted, the court found that Louisiana's choice of the 600 foot boundary was narrowly tailored because it was enacted only after a previous 300 foot boundary was determined by the legislature to be inadequate. *Id.* at 121-22. The court then addressed the total ban on all political activity, and found that two reasons justified

such a sweeping ban. First, the court accepted the State's contention that a total ban on all political activity is superior to a ban only on ballot-related activity because of "enforcement and security problems" arising from attempts to distinguish ballot-related activity from non-ballot-related activity. *Id.* at 122-23. Second, the court accepted the State's contention that activity such as soliciting signatures for a recall petition is *more* disruptive than any other political speech because it requires the voter to accept or reject the position of the worker on the spot. *Id.*

During the pendency of the federal action, a criminal prosecution was initiated against Respondent in state district court. Respondent filed a motion to quash. The trial court held a hearing on the motion to quash on July 19, 1993, and, citing *Burson*, granted the motion, concluding that the statute was unconstitutionally overbroad because it prohibits all political activity within six hundred feet of polling places on election day.

The State appealed the trial court's decision to the Louisiana Supreme Court, which affirmed on federal constitutional grounds only. *See State of Louisiana v. Schirmer*, 646 So. 2d 890 (La. 1994). The Louisiana Supreme Court applied a variant of strict scrutiny to the statute, and, citing *Burson*, concluded that the statute was unconstitutionally overbroad because it extended the 100 foot radius found permissible in *Burson* to 600 feet, reasoning:

> when th[e] blanket proscription on political speech is extended to 600 feet we find that "a difference only of degree" becomes a difference of kind, a difference of "constitutional dimension." *Burson, supra*, at ___, 112 S. Ct. at 1857.

> This is particularly true when the 600-foot limitation is considered in the crowded urban context, where, because of greater population density, polling places tend to be more closely situated. In such circumstances the 600 foot radius may often include a large number of surrounding streets, alleyways, and neutral grounds, with the application of the statute as written stifling political speech in traditional public fora.

State of Louisiana v. Schirmer, 646 So. 2d at 901. The Louisiana Supreme Court went on to conclude that the size of the area, coupled with the total ban on all political activity, constituted a "significant impingement" on the First Amendment, and therefore rendered the statute unconstitutionally overbroad. *Id.* at 901-02 ("[W]e find it sufficient to say that in establishing a 600 foot boundary which proscribes all manner of political speech, not just speech related to matters on the ballot, Louisiana has crossed th[e] line."). The State sought rehearing, which the Louisiana Supreme Court denied.

ARGUMENT

This case is appropriate for review because the decision of the Louisiana Supreme Court is in direct and total conflict with a decision of the Fifth Circuit U.S. Court of Appeals on a matter of federal constitutional interpretation. *See* Rule 10.1.(b) of the Supreme Court of the United States. In addition, this case presents core First Amendment issues which have not been, but should be, resolved by this Court. *See id.* at Rule 10.1.(c). Furthermore, the

decision of the Fifth Circuit U.S. Court of Appeals is in direct conflict with a decision of the Eleventh Circuit U.S. Court of Appeals. *See Clean-Up '84 v. Heinrich*, 759 F.2d 1511 (11th Cir. 1985).

Summary reversal of the decision of the Louisiana Supreme Court, however, is wholly unwarranted. That court's holding declaring La. R.S. 18:1462A(3) & (4) unconstitutionally overbroad is consistent with this Court's First Amendment jurisprudence.

In *Burson v. Freeman*, 504 U.S. 191, 112 S. Ct. 1846 (1992), this Court addressed the constitutionality of Tennessee's electioneering statute, which prohibited ballot-related political speech within a 100 foot radius of polling places on election day. A plurality of this Court, applying strict scrutiny, upheld the statute. This Court first found that the State had a compelling interest in preventing voter intimidation and preserving the integrity of elections. *Id.* at 1851. Next, concluding that a "minor geographic limitation" does not constitute a significant impingement on the First Amendment, this Court held that the Tennessee statute was narrowly tailored to serve those interests. *Id.* at 1857. In so concluding, however, this Court stated one limitation of its ruling, noting that "[a]t some measurable distance from polls, of course, governmental regulation of vote solicitation could effectively become an impermissible burden. . . ." *Id.*

Burson left open the two questions directly posed in this case:

(1) is a statute that enacts a *complete* ban on *all* political activity regardless of content

around a polling place on election day narrowly tailored to serve a compelling state interest? and

(2) if such a statute could be constitutional, at what distance from the polling place must the state's interest give way to the fundamental right of the people to engage in core political speech?

Respondent contends that under controlling First Amendment jurisprudence, as well as the fundamental precepts of the free exchange of ideas on which our polity are founded, a state can have no interest sufficiently compelling to warrant a total ban on all political activity in and around a polling place on election day, and that if such a compelling interest does exist, that interest dissipates with each literal step away from the actual polling place, such that a ban like that enacted by La. R.S. 18:1462A(3) & (4) on all political activity that encompasses a total area of roughly 1,130,000 square feet (approximately 26 acres) is per se unconstitutional.

It is a basic tenet of First Amendment jurisprudence that statutes which impose content based restrictions on speech are subject to strict scrutiny. Indeed, "a content based restriction on political speech in a public forum must be subjected to the most exacting scrutiny." *Boos v. Barry*, 485 U.S. 312, 321, 108 S. Ct. 1157, 1164 (1988). Because La. R.S. 18:1462A singles out political speech in a public forum for proscription – a category of speech to which "the First Amendment has its fullest and most urgent application" – it can survive constitutional scrutiny only if the statute is narrowly tailored to serve a compelling state interest. *Eu v. San Francisco Democratic Central Comm.*, 489 U.S. 214, 223, 109 S. Ct. 1013, 1020

(1989) (citation omitted). Further, there is no doubt that Respondent's activity – circulating a petition – constitutes core political speech. *Meyer v. Grant*, 486 U.S. 414, 421-22, 108 S. Ct. 1886, 1892 (1988).

A plurality of this Court found in *Burson* that a state has a compelling interest on election day in restricting speech related to issues actually on that day's ballot within a certain area around polling places. *See Burson*, 112 S. Ct. at 1851-52. However, it is Respondent's position that a state can have no interest sufficiently compelling to ban non-ballot-related political activity absolutely. Indeed, if the First Amendment stands for anything, it is that on an election day the people must be free to engage in the active exchange of ideas, "[f]or speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75, 85 S. Ct. 209 (1964).

La. R.S. 18:1462A(3) & (4) is unconstitutionally overbroad for two reasons. First, Petitioner's statement in the petition notwithstanding (*see* Petition at 8), the statute *clearly* bans *all* political activity, not just that related to the issues on that day's ballot and not just political campaigning. *See Schirmer v. Edwards*, 608 So. 2d 948 (La. 1992).[4] This is in stark contrast to the statute upheld by this Court in *Burson*. Such restriction is tantamount to outright censorship of core First Amendment speech.

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[4] Also, contrary to Petitioner's statement in the petition, (*see* Petition at 9), if the statute sections at issue in this case are held unconstitutional by this Court, Louisiana will still have an electioneering statute that prohibits ballot-related political activity on election day. *See* La. R.S. 18:1462A(1).

Even if it is permissible to restrict some political speech on election day to serve the State's interest in protecting voters and insuring the integrity of the election process, this statute's reach is an unconstitutionally overbroad means of serving that end.[5]

Second, the statute is overbroad because it bans political speech in an area far greater than that found permissible in *Burson* – six times the radius and thirty-six times the area. Such an area often will include such traditional public fora as streets, sidewalks and parks. This broad sweep renders the statute fatally overbroad, and, as the Louisiana Supreme Court concluded, such a large area constitutes "a difference of kind, a difference of constitutional dimension," compared to the restricted area upheld in *Burson*. *Schirmer*, 646 So. 2d at 901. Whatever the State's interest in protecting the integrity of the polling

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[5] The arguments regarding the statute's tailoring that were accepted as persuasive by the Fifth Circuit are without legal or logical merit. The mere fact that law enforcement agents would have to distinguish between ballot-related and non-ballot-related activity cannot suffice to justify a total ban. Taking such reasoning to its logical conclusion, only a total ban on *all* speech would suffice to achieve the State's end, and that surely is not permissible. Second, the notion that recall petitions are somehow more disruptive than any other political speech is without any factual or logical support. Indeed, if anything, logic dictates that such a petition, which offers a voter the opportunity to participate in the democratic process without actually taking a side on the issue by signing a petition simply to put a matter on the ballot, is *less* disruptive than partisan campaign workers pressuring a voter to take a side. Additionally, ballot measure petitions have a long and cherished tradition in this country, and constitute core political speech. *Meyer v. Grant*, 486 U.S. 414, 421-22, 108 S. Ct. 1886, 1892 (1988).

place, surely it cannot justify prohibiting core political speech unrelated to that day's ballot on a public street two football fields away.

Statutes such as La. R.S. 18:1462A(3) & (4) represent a dangerous undermining of the very foundation of the First Amendment: "[w]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment [i]s to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218, 86 S. Ct. 1434 (1966). If the State can ban all political activity within 600 feet of a polling place on election day, what principled basis is there for preventing it from banning all speech of any sort within that area on election day? If the State can ban all political activity in a 600 foot radius on election day, what principled basis is there for preventing it from extending that ban city or county or state-wide? That is, if the State's interest in protecting voters from undue influence on election day is so compelling, why stop at 600 feet, and why stop with political speech?

CONCLUSION

This case presents First Amendment questions of the highest order, questions that this Court should resolve on the merits. First, the Louisiana Supreme Court's decision and the decision of the Fifth Circuit are in direct and complete conflict. Second, all states have electioneering laws which enact varying restrictions on distance and type of speech, making this an issue of great relevance

nationwide. Third, and most critically, this case involves core First Amendment issues left unresolved by this Court in *Burson*.

For all of these reasons, Respondent respectfully requests that this Court grant Petitioner's petition for certiorari, deny Petitioner's request for summary reversal, and schedule this case for briefing and oral argument.

Dated: October 9, 1995

Respectfully submitted,

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APPENDIX 1

THEODOR A. SCHIRMER, et al, Plaintiffs — NUMBER 92-3000

Shelley E. Corrington,
Individually,
Et Al, Plaintiffs,
- Appellants

versus

EDWIN W. EDWARDS, Governor of the State of Louisiana, and in His Official Capacity, et al., Defendants-Appellees

United States Court of Appeal, Fifth Circuit

Before GARWOOD, DAVIS and JONES, Circuit Judges.

BY THE COURT:

Before the Court is the motion of Plaintiffs-Appellants for injunction pending appeal.

Plaintiffs-appellants are parties seeking to collect signatures on a petition for a recall election seeking the recall of Louisiana Governor Edwin Edwards pursuant to La. R.S. 18:1300.0, *et seq*. They seek to collect such signatures in the vicinity of polling places on the general election day of November 3, 1992. Plaintiffs do not seek to collect these signatures within any such polling places; they do apparently intend to vote while wearing clothing or buttons supportive of the recall effort. Neither the recall nor Governor Edwards is on the November 3 ballot, and plaintiffs do not seek to solicit any signatures, or conduct any activity, with respect to any matter or proposition that is on the November 3 ballot. Defendants-

appellees are the Governor of Louisiana, the Louisiana Attorney General, and the Secretary of State of Louisiana. They have taken the position that La.R.S. 18:1462A prohibits the activity in which Plaintiffs desire to engage within a radius of six hundred feet of the entrance to any polling place, even though none of the matters as to which signatures are sought and the activity desires to be conducted is related to any matter on the ballot.[1]

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[1] Section 1462 provides:

"§ 1462. Acts prohibited on election day: electioneering; exception; enforcement; penalty.

A. Except as otherwise specifically provided by law, it shall be unlawful for any person, between the hours of 6:00 a.m. and 9:00 p.m. to perform or cause to be performed any of the following acts within any polling place being used in an election on election day or within any place wherein absentee voting is being conducted, or wherein absentee voting is being conducted, or within a radius of six hundred feet of the entrance to any polling place being used in an election on election day or any place wherein absentee voting is being conducted:

(1) To solicit in any manner or by any means whatsoever any other person to vote for or against any candidate or proposition being voted on in such election.

(2) To remain within any such polling place or place wherein absentee voting is being conducted or within a radius of six hundred feet of the entrance of any such polling place, except when exercising the right to vote, after having been directed, in writing, by an election commissioner or law enforcement officer to leave the premises or area of a polling place or after having been directed, in writing, by a registrar or deputy registrar to leave the place wherein absentee voting is being conducted.

Plaintiffs brought this suit in the court below seeking a preliminary and permanent injunction prohibiting Defendants from denying to Plaintiffs what Plaintiffs contend are their rights under the First Amendment of the United States Constitution to engage in the above described activity, and contending that such activity is not prohibited by section 1462A. Defendants contend that the activity Plaintiffs desire to engage in is prohibited by section 1462A and that section 1462A, as so construed, is constitutional under the decision in *Burson v. Freeman*, 112 S.Ct. 1846 (1992). Plaintiffs contend to the contrary, arguing principally that the six hundred foot radius established by section 1462A is excessive as compared to the one hundred foot radius sustained in *Burson*, and that the state's interest in proscribing conduct such as theirs is attenuated because their proposed activities do not relate to any matter being voted on, unlike the situation in *Burson*.

On October 19, and 20 the district court held a two-day evidentiary hearing on both the preliminary injunction and the merits, at the conclusion of which the court orally rendered its findings and conclusions in open court. The district court ruled that section 1462A did apply to the activities Plaintiffs desired to engage in, and that the statute as so construed was facially constitutional

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(3) To hand out, place, or display campaign cards, pictures, or other campaign literature of any kind or description whatsoever.

(4) To place or display political signs, pictures, or other forms of political advertising.

under *Burson*.[2] The district court denied Plaintiffs' request for temporary and permanent injunctive relief and dismissed their suit with prejudice. Plaintiffs appeal to this Court. As noted, Plaintiffs have moved this Court to issue an injunction pending appeal enjoining Defendants

> "from enforcing La. R.S. 18:1462 against Plaintiffs in such a manner as to preclude Plaintiffs from:
>
> (a) during the period of absentee voting, October 22 through October 28, 1992, and on election day, November 3, 1992, circulating, while on public property limited to streets, sidewalks and parks in the vicinity of polling places, a recall petition sponsored by Recall '92 to call an election to recall the present Governor of the State of Louisiana, Edwin Edwards; or
>
> (b) voting, whether absentee or on election day, November 3, 1992, while wearing 'Recall '92' t-shirts, buttons or other articles of clothing . . . "

Plaintiffs argue in support of the motion for injunction pending appeal that if they are not granted such relief they will, as a practical matter, be forever barred from soliciting at polling places on behalf of the recall petition. This is because under La. R.S. 18:1300.1 *et seq.* all

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[2] The district court declined to rule on Plaintiffs' claim that the statute was being discriminatorily applied to Plaintiffs in certain particular instances, ruling that such discriminatory application should be addressed in state court proceedings, particularly those in defense of any prosecution.

of the required signatures – in this instance approximately 750,000 minimum, a number that Plaintiffs apparently have not reached, – must be obtained within a 180-day period commencing with the initial circulation of such a petition, such period in this case ending on December 14, 1992 (as we understand it, no election is scheduled in Louisiana between now and December 14 except the November 3 general election). They also contend that polling places are a particularly good place for them to seek signatures, because of the congregation of people there and the fact that under Louisiana law the petition must have exact information respecting the registered voter's name, ward, precinct, and address as these appear on the rolls of the registrars of voters in the states.

On October 27, 1992, we certified to the Louisiana Supreme Court the following question:

> "Whether La. R.S. 18:1462A proscribed on election day, outside of the polling place itself but within a radius of six hundred feet from the entrance thereto, all solicitation of signatures for a recall petition that is not on the ballot that is to be voted on at the election for which the polling place is open, and in the polling place or said six hundred foot radius all wearing of clothing or buttons bearing visible words or symbols supportive of such recall?"

The Louisiana Supreme Court on October 29, stating that although "subsection (1) does not apply to the present case, we believe subsections (3) and (4) clearly proscribe the conduct at issue," answered the certified question as follows:

> "La. R.S. 18:1462(A)(3) proscribes on election day, outside of the polling place itself but within a radius of six hundred feet from the entrance thereto, all solicitation of signatures for a recall petition that is not on the ballot that is to be voted on at the election for which the polling place is open. La. R.S. 18:1462(A)(4) proscribes in the polling place or said six hundred foot radius all wearing of clothing or buttons bearing visible words or symbols supportive of such recall."

We conclude that Plaintiffs have shown the requisites for temporary injunctive relief pending appeal to the extent such relief is herein granted.[3] We have not hesitated to grant such relief ourselves in an appropriate case.

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[3] We said in *Apple Barrel Productions, Inc. v. Beard*, 730 F.2d 384, 386 (5th Cir. 1984):

> "In order to secure a preliminary injunction, the movant has the burden of proving four elements: (1) a substantial likelihood of success on the merits; (2) a substantial threat that the movant will suffer irreparable injury if the injunction is not issued; (3) that threatened injury to the movant outweighs any damage injunction might cause to the opponent; and (4) that the injunction will not disserve the public interest. *Dallas Cowboy Cheerleaders v. Scoreboard Posters, Inc.*, 600 F. 2d 1184, 1187 (5th Cir. 1979).

The decision to grant or deny a preliminary injunction lies within the discretion of the district court and may be reversed on appeal only by a showing of abuse of discretion. *City of Meridian, Mississippi v. Algernon Blair, Inc.*, 721 F.2d 525, 527 (5th Cir. 1983). The four prerequisites for preliminary injunctive relief are mixed questions of fact and law. In reviewing the actions of the district court of abuse of discretion, we uphold the district court's findings of fact unless clearly erroneous. Fed.R.Civ.P. 52(a). The court's conclusions of law, however, "are subject to broad review and will be reversed if incorrect."

See Bran v. Independent American Savings Assn., 838 F.2d 739 (5th Cir. 1988); *Florida Businessmen v. City of Hollywood*, 648 F.2d 956 (5th Cir.1981); Fed.R.App. P. 8; 28 U.S.C. § 1651.

The record makes clear that there is a substantial threat that Plaintiffs will suffer irreparable injury if not allowed to solicit in the vicinity of polling places on November 3. A substantial part of this signature gathering strategy has been reasonably based on such anticipated solicitation.[4] The November 3 election provides one

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Commonwealth Life Insurance Co. v. Neal, 669 F.2d 300, 304 (5th Cir. 1982)."

In *Laurenzo v. Miss. H. S. Activities Assn.*, 708 F.2d 1038, 1042 (5th Cir. 1983), we noted that for an injunction pending appeal the likelihood of success standard could be modified if a substantial case on the merits were presented and the equities weighed heavily in the movant's favor.

The district court here did not separately address the temporary injunction from the merits, although we can infer from its disposition of the merits that it found Plaintiffs had not met their burden under the first factor, "substantial likelihood of success on the merits." The district court did not address the other temporary injunction factors. In denying Plaintiffs' motion for injunction pending appeal, the district court simply referred to its decision on the merits.

[4] The "being voted on in such election" language of clause (1) of section 1462A suggests that such solicitation is not prohibited. Although clauses (3) and (4) are not so limited, construing them to cover such solicitation might have appeared to render clause (1) redundant. An October 5, 1990, unpublished opinion of the Louisiana Fourth Circuit Court of Appeal in *Nathaniel Lacour, et al. v. State of Louisiana, et al.* No. 90-C-12772) held that solicitation of signatures for a petition for a recall election of certain local school board members was prohibited under section 1462A notwithstanding neither such matter nor the

of their prime opportunities to gather signatures, and no other such opportunity will present itself before December 14, 1992, when this petition will be wholly invalid if the requisite number of signatures has not then been procured.[5]

Moreover, we conclude that should we deny Plaintiffs interim relief in this respect, the threatened injury to them outweighs any damage that granting such relief would cause Defendants, and that the granting of such relief would not disserve the public interest. The evidence adequately shows that Plaintiffs intend to and are capable of conducting their solicitation properly and without disruption. Assuming the requisite likelihood of

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members in question were on the ballot. However, under Louisiana law unpublished opinions are not precedential, Louisiana Uniform Rules – Courts of Appeal, Rule 2-16.3, and the *Lacour* opinion is extremely brief and cites no authority. Until October 29, 1992, no other Louisiana court had spoken to the matter. Since *Lacour*, two Louisiana attorney general opinions, No. 91-597, November 12, 1991, and No. 92-650, September 24, 1992, held such solicitation not prohibited by section 1462A where the matter was not on the ballot, but did not cite *Lacour*. About a week before this suit was filed, the Louisiana Attorney General, in opinion No. 92-650(A), October 1, 1992, withdrew those two prior opinions and, relying wholly on *Lacour*, ruled that such solicitation was prohibited notwithstanding that the matter in question was not on the ballot.

[5] Plaintiffs also ask that we enjoin pending appeal any prohibition of their wearing "Recall '92 t-shirts, buttons or other articles of clothing" while voting on November 3. We do not believe that Plaintiffs will suffer irreparable harm or significant injury absent such relief; moreover, the interior of the polling place is a matter of greater interest to the state. We hence deny interim relief in this respect.

success, a matter discussed below, we cannot view the protection of such significant exercise of First Amendment rights as contrary to the public interest. See *Florida Businessmen* at 958.

We turn finally to Plaintiffs' likelihood of success on the merits.

We note that the distance prescribed by section 1462A is 600 feet, 6 times that sustained in *Burson;* the area involved is more that 1,130,000 square feet, approximately 36 times as large as that involved in *Burson* (31,400 square feet). This is greater than any state except Hawaii, which uses a 1,000 foot radius. Only two other states, Kentucky and Wisconsin, each five hundred feet, exceed three hundred feet. Some 37 or 38 states use 250 feet or less, some 25 of these using 100 feet or less. *See Note, Defoliating the Grassroots: Election Day Restrictions in Political Speech,* 77 Geo.L.J. 2137, 2146-479 2196-2200 (1989). So far as we have been able to determine, Louisiana first has a specific protected zone outside the polling place in 1960, using a three hundred foot radius. La. R.S. 1534; Acts 1960, No. 221. These provisions eventually came into section 1462, which was amended in 1980 to increase the distance from three hundred to six hundred feet. There is no indication of any legislative history, legislative committee reports, or findings of any study or research to explain or justify the amendment. The legislator who authored the amendment, a witness for Defendants, testified it was intended to substantially reduce the utility, and hence the use, of volunteer and paid campaign workers ("poll workers") contacting voters on their way to the polls. He testified that this was thought desirable for a variety of reasons: to avoid making that one

last attempt to influence a voter one way or another"; "many of these poll watchers were paid. . . . [I]f we could do away with the poll workers it would save the candidates in our area a great deal of money"; the election commissioners were often busy trying to keep individuals out of the three hundred foot area; there were sometimes "altercations" between "workers of candidates running against each other"; "one of the reasons . . . for the law was not to have people hassled in any way at all when they go to vote to try to encourage higher voter participation"; to change the situation where "a lot of the things that were handed out on election day were not correct. . . . [W]hen that happens in an election, you don't have a chance to respond to it if it's done on election day because the election is over before you have any chance. . . . " He stated that "we don't have poll workers at election precincts any more. That was the real purpose of the legislation and it has generally achieved that objective."

Another representative, a witness for the Defendants who was on the relevant committee and supported the 1980 amendment, testified that he did so "because in the district I live in, the 300 foot limit was very often not enough distance to keep people who were engaged in political activities from intersecting the voters who were going to the polls. . . . [M]aybe half of the precincts in my legislative district. . . . probably had parking lots which were outside of the 300 foot limits" and in such instances voters "as they got out of their cars and attempted to walk to the polls, very often were greeted by people handing out literature, people with signs, people trying to convince them that they should vote one way or

another." He further stated "I think for some people it's intimidating" and "I think it might discourage people from voting" because "I think they generally would like to make up their minds on who they are going to vote for, what they are going to vote for or against, and not be bothered with last minute efforts to change their minds." He also stated that ninety-five percent of the time when people leave their houses, they've made up their minds on who they're going to vote for or what issue they are going to vote for or against and that's the way it ought to be. And, I think that it would be good that if on election day people had the time to consider all of the issues, consider all of the paraphernalia that's been handed out, all the campaign rhetoric, and to make up their minds in a logical way and not have last minute efforts to change their minds." The witness further explained that although the six hundred foot limit did not wholly eliminate poll workers, with that limit "except in very rare instances" voters were no longer subjected to being contacted by such individuals after parking and while walking from their cars to the polling place.

Burson considerably relies on the consensus among the states. As Louisiana's is the second greatest restrictive zone of all of the states, using a radius twice the size of that in any of the forty-six of the states, *Burson* is to that extent less than strongly supportive of Defendants' position. Although the state has offered some justification for the six hundred foot extent of its prohibited zone, these justifications *as applied to political activity not related to any matter on the ballot* have limited relevance to the core concerns relied on in *Burson*, which were protecting the

integrity of the ballot from fraud and intimidation. Persons conducting political activity not related to a matter on the ballot have no incentive to attempt to prevent people from voting or to affect how they vote at the polling place, and the voters are certainly less likely to perceive that the activities of such persons are aimed at their voting or how they vote in the polling place. While there was evidence that it might be administratively confusing to distinguish between the two, this testimony was more in the way of speculation as opposed to being based on actual experience.[6] There may be some reasons in the nature of prohibiting overcrowding or physical obstruction that would justify eliminating a broad range of conduct in the immediate vicinity of the entrance to the polling place. But nothing suggests that such justification would have any significantly realistic application to non-ballot-related activities at anything near approaching the six hundred foot distance specified in the statute.

Prohibiting all political speech, whether or not ballot related, within a six hundred foot radius, may well be sufficiently narrowly tailored for *Burson* purposes.

We do not ultimately decide the merits of this case. But we are convinced that Plaintiffs have made a sufficient showing of a substantial case, with the equities

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[6] There is no evidence that the legislature specifically considered this aspect of the matter, other than the wording of the statute itself. The legislator who sponsored the 1980 amendment increasing the distance to six hundred feet testified: "I do not recall specifically any discussion of anything other than the actual people being at the polls for or on behalf of a candidate of an issue to be voted upon. That was what we were addressing."

being correspondingly in their favor, to justify a limited injunction pending appeal.

Accordingly, IT IS HEREBY ORDERED as follows:

Defendants, their agents and employees, and all persons acting in concert with them, are hereby enjoined, pending further order of this Court, from enforcing La. R.S. 18:1462 in such a manner as to preclude on November 3, 1992, the soliciting, on public streets, sidewalks or parks (or other outdoor public areas in which political solicitation is allowed under Louisiana law on days other than election or absentee voting days) not closer than one hundred feet to the entrance of any polling place, or persons to sign, or not to sign, a petition to call a recall election to recall Governor Edwin Edwards (or any other petition to call an election with respect to any person or proposition not on the November 3, 1992 ballot), provided such soliciting is carried out in a peaceable, quiet, and orderly manner.

Except as otherwise ordered, the request for injunction pending appeal is DENIED.